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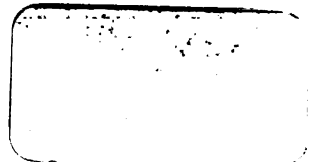
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CINCINNATI SUPERIOR COURT DECISIONS

A COLLECTION OF CASES DECIDED AT SPECIAL AND
GENERAL TERMS OF THE

SUPERIOR COURT OF CINCINNATI

BY

LEWIS M. HOSEA

JUDGE OF THE SUPERIOR COURT

NOTE : The opinions printed in this volume, some of which have already
appeared in current law publications, have been collected in
this form for personal convenience of reference
in the duties of the court.

CINCINNATI, OHIO:

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Roster of the Superior Court

1838—1907.

JUDGES OF THE SUPERIOR AND COMMERCIAL COURT OF CINCINNATI UNDER THE ACT OF 1838.

DAVID K. ESTE, 1838 to 1845.

CHARLES D. COFFIN, 1845 to 1847.

WILLIAM JOHNSTON, 1847 to 1850.

CHARLES P. JAMES, 1850 to 1851.

GEORGE HOADLY, 1851 to 1853.

(Terminated February, 1853, by Constitution of 1851.)

JUDGES OF THE SUPERIOR COURT UNDER ACT OF APRIL 7, 1854 (52 O. L. 34).

- (a) WILLIAM Y. GHOLSON,* 1854-1859; GEORGE HOADLY,* 1859-1864; ALPHONSO TAFT,* 1864-1872; J. BRYANT WALKER, (Apptd.) 1872; ALFRED YAPLE, 1872-1879; JOSEPH B. FORAKER,* 1879-1882; WILLIAM WORTHINGTON, (Apptd.) 1882-1883; HIRAM D. PECK, 1883-1889; EDWARD F. NOYES,* 1889-1890; JOHN R. SAYLER, (Apptd.) 1890-1891; RUFUS B. SMITH, 1891-1904; HARRY M. HOFFHEIMER, 1904 (present incumbent).
- (b) OLIVER M. SPENCER, 1854-1861; CHARLES D. COFFIN, 1861-1862; STANLEY MATTHEWS,* 1862-1863; CHARLES FOX, 1863-1868; MARCELLUS B. HAGANS 1868-1873; MYRON H. TILDEN, 1873-1878; JUDSON HARMON,* 1878-1887; WILLIAM H. TAFT,* 1887-1890; SAMUEL F. HUNT, 1890-1898; EDWARD DEMPSEY, 1898-1903; LEWIS M. HOSEA, 1903 (present incumbent).
- (c) BELLAMY STORER, 1854-1872; JOHN L. MINER, (Apptd.) 1872; TIMOTHY A. O'CONNOR, 1872-1877; MANNING F. FORCE, 1877-1887; FREDERICK W. MOORE, 1887-1897; WILLIAM H. JACKSON, 1897-1902; HOWARD FERRIS, 1902 (present incumbent).

* WM. Y. GHOLSON, later Judge Supreme Court of Ohio; GEORGE HOADLY, later Governor of Ohio; ALPHONSO TAFT, later Attorney-General, U. S., and minister to Russia; JOSEPH B. FORAKER, later Governor of Ohio, and U. S. Senator; EDWARD F. NOYES, later Governor of Ohio, and minister to France; STANLEY MATTHEWS, later U. S. Senator and Justice U. S. Supreme Court; JUDSON HARMON, later Attorney-General U. S.; WILLIAM H. TAFT, later U. S. Circuit Judge, Governor of the Philippines, and Secretary of War.

ERRATA.

IN RE DONALDSON *v.* SUTHERLAND.

Through an error in typewriting this opinion purports to be concurred in by the other judges sitting in the case. It is a *dissent* from the holding of the majority that the contract was entire and not severable.

The reference, near the close, to the ruling in 65 Maryland Reports, is also an error. The language quoted is from the opinion in *Wooten v. Watters*, 110 North Carolina Reports.

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Cincinnati Superior Court Decisions.

THE CINCINNATI STREET RAILWAY CO. v. LONDON McBEE.

1. A bill of exceptions being placed in the hands of the trial judge, October 20, 1903, the period of 5 days allowed for his action expired (under Section 4951, Revised Statutes), on October 26 (October 25 being Sunday). The ten days' extension endorsed thereon expired, therefore, on November 5, on which day the judge signed the bill. Under the maxim *omnia rite esse acta praesumuntur*, his action must be taken as correct. The manner of the action being substantially regular, it is to be presumed that all formal requisites affecting its validity were complied with.
2. A verdict upon the facts will not be disturbed except upon the strongest showing, especially where the question of contributory negligence is involved upon facts that might lead different minds to different conclusions. Snell case 54 O. St., 201, and Wadsworth case, 1 O. Cir. Ct. Rep. (N. S.), 483, analyzed and compared.

HOSEA, J.; FERRIS and HOFFHEIMER, JJ., concur.

The motion to strike from the files the bill of exceptions was considered at a previous sitting of the general term, and upon reconsideration we perceive no reason to recede from the views then expressed. The bill of exceptions being placed in the hands of the trial judge in proper time, on October 20, 1903, his jurisdiction over it was complete. The initial period of five days allowed for his action would have expired on October 25, excepting for the operation of Section 4951, Revised Statutes, under which the period expired on October 26; and the period of "ten days beyond the expiration of the period aforesaid" expired with

November 5, on which latter day the judge signed the bill.

It is claimed, however, that as the endorsement of the extension was dated November 5, the extension must be taken to have been made on that day, but this does not necessarily follow.

Omnia rite esse acta praesumuntur is a maxim recognized from time immemorial as applying to the acts of public officers (*Downing v. Ruger*, 21 Wend., 178). The rule that "acts done which pre-suppose the existence of other acts to make them legally operative, are presumptive proof of the latter," was early adopted and has been repeatedly followed in Ohio (*Lessee of Ward v. Barrows*, 2 Ohio St., 242; *Lessee of Combs v. Lane*, 4 Ohio St., 612; *Reynolds v. Schweinefus*, 27 Ohio St., 311; *Knox County v. Bank*, 147 U. S., 141).

A practical application of this rule has been made to bills of exceptions with the holding that "the record imports verity and can not be impeached by evidence *aliunde* tending to show that the requirements of the statute were not complied with" (*Huddleston v. Hendricks*, 49 Ohio St., 297; *Findlay Brewing Co. v. Brown*, 62 Ohio St., 202; *Felch, Assignee, v. Hodgman*, 62 Ohio St., 312). In the latter case the rule is stated with added force as follows:

"The ordinary rule is that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites affecting its validity were complied with."

In the present case the judge endorsed his extension upon the bill and signed the bill within the extended period—all in accordance with the law. The date of the endorsement was not required by statute, and consequently was not necessary (*Felch v. Hodgman, supra*):

"When the question is not of power, but of the manner in which a supposed act was done, the presumption is in favor of the officer having performed his duty in a legal and sufficient manner. * * * When a statute requires an act to be done, and gives no direction as to the mode of performance, and proceedings are had in the direction of

performance, the duty will be presumed to have been rightly performed until the contrary is made to appear" (*Reynolds v. Schweinefus*, *supra*, pages 320 and 321).

It may be added, that, even if the court by mistake or forgetfulness neglected to make the endorsement of the extension within the first five days, his subsequent endorsement prior to signing the bill must be regarded as within the general power of correction vested in the courts of Ohio by Section 5114, Revised Statutes, and as curing the defect. (*Railway v. Bailey*, 70 O. S., 88.)

The trial errors complained of by the plaintiff in error here mainly hinge upon the question, whether the verdict and judgment in the court below were against the weight of the evidence and contrary to law. The facts in brief, were, that McBee, a passenger on a northbound car, gave the signal to stop at an intersecting street, and the car had almost stopped at the crossing when he stepped off the east side of the rear platform where he had been standing, and proceeded to cross westwardly behind his car over the tracks to the opposite side of the street; but, just as he stepped beyond the track over which he had come, to the adjoining parallel track, he was struck and severely injured by a southbound car coming rapidly upon the latter track.

The case, upon the facts, is substantially identical with that of *Street Railway v. Snell*, 54 O. S., 197, in which the trial court is reversed for directing a verdict. Snell had alighted from an eastbound car when it had slackened its speed for him as it approached a crossing; he got off at the south side and passed behind the car northwardly; and, as he neared the south rail of the westbound track, was struck by a car coming west. The court says:

"At some time while crossing he looked both east and west along the track, but the precise point from which he looked is not clear."

The case is also substantially similar upon its facts to that of *Cleveland Electric Railway Company v. Wadsworth*, 1 C. C.—N. S., 483, in which the trial judge is reversed because he did *not* direct a verdict. As in the Snell case, the passenger got off as the car slowed up at a cross-

ing, going eastward, passed to the rear of his car northwardly across the street and was about to step upon the south rail of the adjoining trackway when he saw and was struck by a westbound car whose headlight was brightly burning (it being at night).

The latter case was affirmed without report by the Supreme Court in 70 O. S., 432; so that our inquiry as to the governing rule should be narrowed to a comparison of these two cases which indicate the extremes between which it lies. But the flexible character of the rule is shown by the contrary results of these two cases in this, namely: the rule as announced in the fourth syllabus of the Snell case is, that where the question of contributory negligence "depends upon facts from which different minds might draw different conclusions," it is for the jury. The action in the Snell case was consistent with this principle because the court, taking a different view from that of the trial judge, upon the facts, gave effect to the principle by reversing the action of the judge below and sending the case to a jury. But in the Wadsworth case the difference of view of judges upon the facts seems to have produced an opposite result.

The contrary character of these results justifies, if it does not require, a re-examination of the legal relations involved in such cases.

It is manifestly the purpose of the Supreme Court, in the Snell case, to formulate an approximation to governing rules consistent with the primary holding that the rights of a street railway company, operating cars over the streets of a municipality, are neither higher nor different in kind from those of the ordinary citizen. And it is very essential to keep this in mind; for, in this respect, the duties and obligations relating to steam railroads rest upon quite a different legal basis and precedents, and rules drawn from such cases do not ordinarily apply.

The rule of the Snell case is, that those who pass across a street railway at a street crossing are held to the exercise of ordinary care only,—“such care as might reasonably be expected of persons of ordinary prudence.” Moreover, they

are not required to anticipate negligence on the part of those operating cars; and while they should use their faculties of perception for their own protection, yet "it is not necessarily negligent to fail to look in both directions for the approach of a car, but this depends upon the circumstances."

In view of the facts of the Snell case which called forth these suggestions, and of the character of the court's action thereon, the meaning of the above holding seems to be that while a party is required to use his faculties of seeing and hearing reasonably to avoid danger, yet the circumstances may be such that, through no fault of his own, he might not by so using them perceive danger in time to avoid it.

In dealing with the facts in this class of cases it must be remembered that a party crossing a street behind a street-car, is, while at the precise place where his faculties should be exercised, cut off by the presence and position of the car, behind which he is passing, from seeing—and to a great extent from hearing—an approaching car on the parallel track. When the party injured is a passenger just alighted from a car at a crossing, it is at least a circumstance to be considered, whether under his right to presume that the company will exercise due care to protect him from dangers from their own cars, their failure to warn him, at a place where they themselves have interposed an obstacle to the exercise of his own faculties of observation, is not such an assurance of safety as may excuse him.

On this point the opinion in the Snell case speaks with no uncertain sound. The court say (page 206):

"In this case * * * there was a total disregard of plaintiff's rights—a clear case of gross, culpable negligence. The company owed to the passenger who had just alighted the duty of permitting him to cross from its car to the opposite side of the street without peril of his life or limb from the acts of the company; instead of which it sent its car down the grade at a breakneck speed without giving any warning or taking any pains to avoid running him down."

Let us see what the conditions in such a case really are. The space between adjacent trackways in this city is about

6 SUPERIOR COURT OF CINCINNATI.

three and a half feet. As a car projects laterally beyond its trackway something over a foot, the space between cars in passing is about twelve inches. To a person crossing behind a car the view ahead upon the other track is confined to a very few feet until he has passed beyond the actual path of travel of his car—that is, the view is cut off by the car from which he has just alighted. But, as a man walking covers about three feet at a step, a single step beyond the outer line of the standing car carries him into the path of danger of the approaching car on the next track. The significance of these facts appears when we consider the results of speed of cars in the same connection.

A car traveling at ten miles per hour covers about fifteen feet in one second of time; at fifteen miles per hour, twenty-two feet in one second; and at twenty miles per hour about twenty-nine feet in one second. While a man is taking one step of three feet, therefore, the approaching car is traveling fifteen, twenty-two, or twenty-nine feet in the same time, according to the speed suggested. It will be obvious therefore that there is little chance for safety for one crossing a street behind a car at a crossing, as against a car coming in the opposite direction upon an adjacent trackway at a speed of ten to twenty miles an hour, unless the pedestrian stops still behind the standing car and cranes his neck forward to see beyond it, being careful not to place his head beyond the neutral space of twelve inches between the paths of passing cars at the risk of losing it.

But our Supreme Court repudiates the doctrine requiring a street pedestrian to "stop, look and listen" before crossing an electric railway, upon the theory that the right of operating cars in the streets is subservient to the equal rights of the public for passage along the street. The figure used for illustration by the court, evidently intended to show its impracticability, is that of a man "sitting on a bank waiting for a stream to run by," and they say that the rule for street cars is the same as for ordinary vehicles, and add (page 209) that one crossing a street can not be required "to extend his observation beyond that distance with-

in which a car proceeding at a customary and reasonably safe speed would threaten his safety."

It seems to us a fair and logical deduction, therefore, from the observations and reasoning of the Snell case that because of the peculiar danger to which a passenger alighting from a street car is exposed, in passing behind the car to cross over the street, the measure of care required of the operating company is to be greatly enlarged, and indeed it may fairly owe him the degree of care due a passenger until he is out of the range of peril from the cars. It also follows, that, as the measure of care is enlarged for the company it is diminished for the passenger to the extent that he is by, force of circumstances, obliged to rely upon the company for protection by ample warnings and slackened speed of cars, because the company has placed an obstacle in the way whereby he is prevented from exercising his faculties as he might otherwise do for his own protection.

In the case at bar the speed of the oncoming car is variously estimated. The plaintiff avers that he was looking and listening as he passed to the rear of his own car and saw the approaching car at a distance of twelve or fourteen feet; but was coming so rapidly he could not avoid collision. The case at bar strikingly illustrates the conditions to which we have referred and which are inherent in this class of cases. The testimony of plaintiff—corroborated to some extent at least by others—is that he did use his faculties for seeing and hearing, but he heard no signal nor warning of any kind, and could not see along the south-bound track because of the presence of the car on which he had been riding, until he passed it, and then the down car came upon him so suddenly he could not escape. His language describes the situation with accuracy. He says: he "went forward looking and listening"—"listening for the gong"—"listening for trouble sure, because there is generally trouble in lines like that,"—"when I first seen the other car coming I was just stepping out looking and stepping and pressing forward."

Asked where he saw the car coming south, he says: "No, you can't see it on the same track the other car is on;" "you can't see it;" "it is impossible to see it until you pass" (meaning evidently that from the track over which he had come he could not see the other track because of the presence of the car). And again: "I could have got out of the way if it wasn't going so swift."

There was, as might have been expected in a case three years old, more or less variation in testimony in detail as to the speed of the southbound car; whether and just where a gong was sounded, if at all; whether the conductor gave any verbal warning, and when, if at all, etc.; but the preponderance of the testimony, oral and circumstantial, showed that the down car came at a high speed.

The motorman who saw McBee about a car-length away says he instantly turned on sand to the tracks and operated the reverse. All this occurred north of the north crossing at Flint street. The consensus of testimony was that when the car came to a stop it was entirely over and at least ten feet beyond the south crossing of Flint street, and the distance between the crossings is shown to be fifty-one feet and a fraction. It had run therefore, on a sanded track on an up grade and reversed, a distance of fifty-one feet between the crossings, plus ten feet over, plus a car length of about twenty-five feet—a total of eighty-six feet, plus whatever distance the car was above the north crossing, say ninety feet in all. There was no snow on the tracks, but the weather was cold, and, as one or two witnesses expressed it, "drizzly but not raining." It is manifest, therefore, that the car must have been running at an unusually high speed; and if it was, as stated by McBee, only fourteen feet away when he reached the neutral twelve-inch space between the trackways and he could see beyond his own car, it was upon him in less than a second of time—perhaps less than half a second of time—and gave him no chance to get out of the way by the exercise of any sort of care, ordinary or extraordinary.

The circuit court distinguishes the Wadsworth case from the Snell case on the ground that in the former the party

had not his mind on his surroundings at the time of the injury, and hence did not use his faculties to avoid danger that he should have perceived. According to briefs of testimony in the opinion, the court seems to have assumed that he was engrossed in other thoughts, and hence was negligent; whereas they say that the reverse was affirmed in the Snell case because the plaintiff himself testified that he looked in both directions for an approaching car. By this test the case at bar falls distinctly within the terms of the Snell case, and as distinctly without the terms of the Wadsworth case. But we are not satisfied with such a test. A man may be excused for not suspecting danger which he can neither see nor hear, because of the obstacle of the car from which he has just alighted, and because he relies, and has a right to rely, upon the presumption of due care on the part of the company proportioned to the circumstances, and also upon the absence of any direct warning from the conductor immediately charged with responsibility toward him as a passenger.

We think that contributory negligence should not be imputed to one injured under such circumstances as appear in this case—where palpable and gross negligence is shown on the part of the operating company. As the conditions are thus created by the nature of street car service and are inherent in the business, they can only be remedied by extra care on the part of the operating company in being held to an ironclad rule of utmost care in passing cars at street crossings and of ample warning to passengers alighting.

We find no error in the charge of the court, and from a careful consideration of the testimony we find no reason for disturbing the verdict. The charge of the court was fair, impartial and just, and we do not think the jury were in any way misled. The judgment therefore must be affirmed, and it is so ordered.

Outcalt & Foraker, for plaintiff in error.

Thomas L. Michie, for defendant in error.

JOHN M. SMEDES v. THE CINCINNATI INTERTERMINAL
RAILROAD COMPANY.

1. An injunction against the construction of a railway upon or across a public street is properly refused an individual property owner where the railroad company is proceeding under ordinance of the city council, duly passed, and where the proof shows that the injuries claimed to result are only those suffered in common with all other property owners of the neighborhood, and are the infraction of public and not of private rights.
2. The individual property right of an owner, in respect of property abutting on the street, extends only to the middle of the street. He has, in addition, a general right as to access, air, light, etc., which may become specialized by injuries specially accruing to him; but until thus specialized, his general right as one of the public, must be enforced through the proper municipal agencies in the manner provided by law.

HOSEA, J.

The petition in this case alleges plaintiff's ownership of a lot 25 feet by 60 feet deep on south side of Third street, lying 25 feet west of Mill street; and that by virtue of an exhibited ordinance of the Board of Legislation of Cincinnati, passed August 24, 1903, the defendant laid a track across the sidewalk on the north side of Third street opposite plaintiff's property, and thence southeastwardly across Third. Plaintiff also alleges that defendant intends to construct a double-track elevated railway from the northwest corner to southwest corner of Third and Mill, and that these constructions will impair the access to his property; and also that prior to the track construction described, his only means of exit from his property, without crossing railroad tracks, was along Third both ways to other named streets, including Stone street; that the defendant's railway is extended across Stone street, completely blocking same, and that the defendant intends to cover said tracks with elevated tracks and to cover all of said tracks with a permanent building.

He avers that the trackage crossing of Third street at

Mill street violates the Constitution of the United States, and the statutes of Ohio which grant no power to construct overhead track, and also the Constitution of Ohio; and he asks a mandatory injunction to prevent the defendant from laying additional surface tracks, from continuing to lay the surface track already laid, and constructing the overhead railway, and a temporary restraining order pending the hearing.

An amendment to the petition filed at the hearing avers that the surface track occupies a specified portion of the sidewalk immediately opposite plaintiff's lot, and that the proposed overhead construction will be above the same; and that this will deprive him of his property and easements in Third street; will depreciate his property; that the running of cars and locomotives is an unlawful diversion of the street use, is an added burden, and will impair his rights and cause him irreparable damage, etc.; and that the overhead crossing will darken his premises and produce a muddy condition of the street, creating a nuisance.

The answer of defendant avers that it is proceeding in accordance with the ordinance in building its railroad, but denies any impairment of access to plaintiff's property; and avers that it is building a single—not a double—track, crossing Fifth street, Baymiller and Third streets, at such an elevation as not to interfere in any manner with street travel; and that the vacation of Stone street was by ordinance duly passed; and denies all other allegations.

The cause is by agreement of parties submitted for determination as upon final hearing—the plaintiff's affidavits being submitted as testimony in its behalf and the defendant producing a witness before the court, and the case being argued at length by counsel for both parties with marked ability upon the ultimate questions.

The affidavits submitted by plaintiff are opinions of plaintiff and other persons who are not shown to be qualified, except by general familiarity with the neighborhood. The plaintiff substantially reiterates the allegations of the petition and amendment, and the other affiants stating generally an acquiescence in plaintiff's views as to an indefinite

lessening of value of plaintiff's lot and impairment of access. No further testimony was offered by plaintiff.

Defendant produces the engineer and contractor in charge of the construction of the railway, and a blue print working drawing stating various distances and dimensions, showing the nature and extent of the work and its local relation to plaintiff's property. It is testified that defendant owns considerable property on the north side of Third from Mill westward, where it is establishing a yard and distributing depot for the reception of goods for and from its main elevated line, and that the surface track in question which crosses Third street southeastwardly (being the track complained of by plaintiff) is a spur or switch track for the purpose of setting cars in and out of said yard to be loaded or unloaded, and that this spur-track is not beneath but adjacent to its elevated structure and wholly independent; that it is laid flush with the surface of the street and constitutes no impediment to ordinary travel of the street. It is also shown that the elevated roadway is a single track and the crossing of Mill and Third streets will be a single, open-truss bridge, all supports of which are on defendant's own property, except one iron post or pier just within the curb line at the south side of Third east of Mill, and that the bridge will have an overhead clearance above the street and sidewalks of sixteen and a half feet. The side of the truss bridge at the nearest point will be about thirty-six feet from the southwest corner of Third and Mill, and the bridge eighteen feet wide, out to out.

It is also shown that, projecting the side lines of plaintiff's twenty-five-foot lot northwardly across Third street to the property line at the north side, the spur-track enters upon the north pavement at the property line fifteen feet west of the easterly projection of plaintiff's lot line, and crosses said projection eight feet south of the property line—thus covering a triangular portion of the pavement at the northeast corner of said space between the projections. The triangle is of fifteen feet base (on the property line) and eight feet vertical (on the easterly projection).

It will be apparent from the recitals of the petition and the evidence offered in support, that no distinction is made in the allegations of damage, between those rights of plaintiff upon which an individual action may rest and those enjoyed in common with the public and which must be asserted as public rights through the appointed agencies.

The alleged unlawfulness as to laying tracks across the street or building an elevated structure without statutory authority can not be inquired of here. The real question is whether in the doing of it, plaintiff has suffered any injury of a special kind peculiar to him and not shared by him in common with the other lot owners upon the street.

Again, it is to be observed that the present action does not seek an ascertainment and enforcement of damages for injury sustained or to be sustained, but a perpetual injunction, solely to prevent operation and maintenance of parts constructed and a prevention of further construction. No demand explanatory of the prayer for a "mandatory" injunction is pleaded. The nature of the action standing thus alone with no proposal to seek compensation, therefore requires cogent proof of facts necessary to give a court of equity jurisdiction. The facts to be shown are: (1) A present necessity to enjoin in order to preserve the status and that a continuance will result in irreparable injury to plaintiff; (2) inadequacy of legal remedies; and (3) that the injunction, upon a consideration of relative expense and inconvenience, would not be inequitable and oppressive to defendant and to the public whom it is organized to serve. *Green v. Richmond*, 155 Mass., 188.

Of course a case of this character does not admit of a perpetual injunction, and there is no need of a "mandatory" injunction to prevent acts in progress or threatened. Notwithstanding a mistake as to the relief needed, however, a court of equity is not bound by it, but will mould the relief to suit the exigencies of the case.

So far as concerns the trackway crossing Third street to the east of plaintiff's lot at the street level, or the anticipated muddy condition of Third street under the bridge when constructed, it is manifest that any inconveniences

growing out of them is suffered in common with all who have occasion to use the street, and they fall directly under the rule adopted in *Kinnear Co. v. Beatty*, 65 O. S., 264, as follows:

"Where one suffers in common with all the public, although from his proximity to the obstructed way or otherwise from his more frequent occasion to use it he may suffer in a greater degree than others, still he can not have an action, because it would cause such a multiplicity of suits as to be of itself an intolerable evil." (Citing *C. J. Shaw in Quincy Canal v. Newcome*, 7 Met., 276).

The closing up of Stone street is shown to have been the act of the city by formal vacation, and it does not appear that at any point on any other streets having access relation with plaintiff's lot, ordinary travel is physically impeded by any structure of defendant placed or to be placed thereon or thereover. The obscuration of light by the truss bridge at such a distance, as shown, and in such relation to the lot in question could hardly be perceptible, much less material, to occupants of the house on the lot, deriving light—as it does and must—only at front and rear. The expected accumulation of water beneath the truss bridge is, moreover, fanciful. Certainly no more rain could fall there than elsewhere, and it is not to be expected that water shall stand in public streets and dependence be placed on the sun to dry out the accumulation. The obscuration of view as to a limited portion of the sky is hardly to be considered as a factor. It may be said, in a word, that this aggregation of inconsequential and specious objections does not add strength to any one, but rather weakens the force of the entire demand.

The allegation as to prospective damage from operation is quite too indefinite to be considered. There is neither allegation nor testimony in the case that the road is to be operated by steam. The inference to be drawn from the ordinance—which gives authority to erect and maintain electric poles and wires, and nowhere mentions steam—is that the road is to be operated by electricity. In such case the inconvenience to property owners would be reduced

to a minimum. The terms "locomotives and cars," used in the amended petition, apply to electric as well as to steam roads.

In this connection, it may shorten discussion and clarify the legal situation to quote another recent utterance of our Supreme Court which is quite applicable to the case in hand. It is as follows:

"While the abutting lot owner has the right of public travel on the street, and the right of ingress and egress from the street to his lots, the public authorities retain the right to improve the street and place such means of travel thereon as in their judgment shall best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy because he is not wronged, said easement—all the property right he has in the street—not being interfered with." *Traction Co. v. Parish*, 67 O. S., 181 (191).

After a careful consideration of all the facts, the court is unable to discover any such material interference with plaintiff's rights as to justify resort to the extraordinary powers of equity. Cases of a similar nature, substantially, have been before our local courts and the grounds of action applicable here have been so fully discussed as to render further comment unnecessary. See *P. C. & St. L. R. R. v. Cinti.* (Superior Ct.), 16 Bull., 367 (1904); *Gunning v. Rwy.* (Com. Pleas), 14 O. D., 660 (1904); *C. C. C. & St. L. Rwy. v. C. I. & W. R.* (do), 15 O. D., 112; *Herzog v. Railway*, 15 C. D., 702.

The only question raised in this case not involved in those above cited, is plaintiff's claim of a direct taking of his property in his appurtenant easement by the trackage occupancy of the fifteen-by-eight-feet triangle on the opposite side of the street adjacent to the north property line, and between his side lines projected across the street thereto.

Briefly stated, the rule of law in Ohio, beginning with *McComb v. Akron*, 15 Ohio, 474 (and earlier), and culminating in *Callen v. Edison Electric Light Co.*, 66 O. St., 166 (174-5), is, that the abutting owner has a beneficial use or easement in the part of the street in front of his property for

all purposes consistent with and subordinate to the dominant rights of the public therein for street purposes. As defined in *Crawford v. Village of Delaware*, 7 O. St., 469, it is a "private right of the nature of an incorporeal hereditament legally attached to their contiguous grounds and the erections thereon." "This easement appendant to the lots * * * is as much property as the lot itself." (See also *Branahan v. Grand Hotel of Cincinnati*, 39 O. St., 333, and *Penrod v. City of Columbus*, 73 O. State, —.)

If this easement, as held by the circuit court in *Madden v. Pennsylvania Railroad Company*, in 21 O. Cir. Ct., 73, extends clear across the street to the opposite property line, then, obviously, the easement of the opposite owner extends back across the same territory. Thus we would have double easements in the same street, appendant to two opposite independent lots, each of a nature that precludes a use in common, existing solely with reference to each lot as appurtenant thereto, and "as much property as the lot itself."

The manifest incongruity, not to say impossibility, of such a relation, carries its own refutation. If, for example, a man should desire to construct a cellar-way or coal-vault, erect a hitching-post, or plant trees, in front of his house, under this doctrine he must necessarily obtain consent of his opposite neighbor by purchase or negotiation, or else be enjoined in trespass, for he would have no power to condemn, and even in a suit of the present nature he must make his opposite neighbor a party. It seems evident therefore that if this is what the circuit court meant, it has confused things that are quite distinct. One is a beneficial right in the soil for all purposes subject to the dominant public right; the other is a mere right of protection against injurious change of conditions.

Undoubtedly the abutting property owner has a general right in the street to its full width as one of the public, to light, air, facilities of travel, etc.; but the special property right in the street contiguous to his lot as an "appendant easement," is a personal right of ownership—in fact, a qualified equitable fee with a possible reversion of the legal title—a property right going to the entire beneficial use of

that contiguous part of the street on which his lot abuts, which is, and necessarily must be, exclusive of every other lot owner, and subordinate only to the public right in the same soil for street purposes. The actual occupancy of any part of such special easement is a taking, *per se*, of one's interest in the land, and may be enjoined without proof of damage, but interference with the other and general easements which extend to the whole street, will be enjoined at the suit of a general owner upon the theory of constructive taking, only upon proof of actual or threatened injury of a substantial and material character, to the particular premises, and not shared in common by other lot owners. The necessity, in the way of material injury, must be clearly shown as a fact under the general rule relating to injunctive relief based on inadequacy of legal remedies.

From the inherent nature of the special easement of contiguity it follows, as a physical necessity, that the outer limit of such particular or appendant easement must be the center line of the street; and this is declared in *Callen v. Edison Elec. Light Company*, 66 St., 166 (174-5).

"For practical purposes," says the court, after citing the prior cases on the subject and pointing out that in country roads this easement extends to the center as an incident of ownership, "there is no substantial difference in the right of the owner of lands abutting on a country highway in such highway, and that of the owner of a lot abutting in a city street in such street."

This must be held to overrule the circuit court doctrine cited. *Ad medium filum viae*, is also the rule in many other jurisdictions applicable to both private and public ways (see 146 Mass., 585; 47 N. J. Eq., 421; 49 N. Y., 346; 14 C. B. (N. S.), 398; see *passim*, *Gas & Fuel Co. v. Townsend*, 1 N. P. (N. S.), 289, and authorities therein cited).

That the passage of a railway over the pavement opposite the lot of plaintiff and between the projection of his side lines, is a direct taking of his property upon the theory that it is his appurtenant easement, such as is meant in the series of Ohio cases referred to, is therefore untenable. Upon this theory a railway would pay double for all it gets in

the use of the street, and lot owners would be in constant disputes.

In the present case, as in *P. C. & St. L. Ry. v. Cinti., supra*, and *Gunning v. Railway, supra*, the track is not part of the main line, but a spur to a freight-distributing station.

Presumably, therefore, the use will be no more of an impediment to travel than if horses and wagons were employed for this purpose, and this is held to be such a use as the authorities had a right to grant. *Traction Co. v. Parish*, and *Gunning v. Ry., supra*.

The facts disclosed do not make out a justifiable basis for injunctive relief. Any injury to plaintiff's lot that may exist from the construction is not shown to be of so material and injurious a nature as to require equitable interposition. Plaintiff has a plain and adequate statutory remedy at law for all injuries suffered, and to this he must be remitted. Moreover, it is quite obvious to the court that to stop the progress of work of this character and magnitude, already under way, with contracts made and men employed, would be inequitable and oppressive out of all proportion to any injury to plaintiff's easement, if such exists; and it is not claimed that defendant is not entirely solvent and able to respond in damages, nor is any sufficient reason shown why this suit was not brought at an earlier stage of the enterprise.

The prayer for injunction will be denied, and as no other necessity for equitable relief appears, the petition will be dismissed.

Petition dismissed.

Charles H. Stephens, Sr., and Charles H. Stephens, Jr.,
for plaintiff.

John Galvin, for defendants.

THE SECURITY INSURANCE COMPANY ET AL. v. HARRY H.
MICHAEL ET AL.

1. Where several insurance companies seek to have an appraisal, award and finding of the amount of loss, made at the instance of all jointly, set aside by reason of fraudulent misrepresentations of the assured, all must be joined as plaintiffs unless some refuse to join. Those who so refuse may be made defendants upon allegations of the facts.
2. In such case all are parties in interest in the immediate relief sought, namely the setting aside of the joint award which is the basis upon which all are to be held to contribute proportionally to make good a common loss.

HOSEA, J.

Opinion on demurrers to petition and cross-petition.

Suit is by two of six insurance companies (the other four being made defendants) against the defendant firm, seeking to set aside an appraisal, award or finding, of the amount of loss, alleged to be incorrect, excessive and unjust through and by reason of fraudulent acts and fraudulent misrepresentations of the insured in and during the appraisal proceedings, which acts and misrepresentations are claimed to render the policies void.

It appears, inferentially at least, that the award was upon a joint submission in that behalf by all the companies concerned; and the four companies (or three of them) appear represented by counsel for plaintiffs and file cross-petitions following, *in totidem verbis*, the averments of the petition and asking independently the same relief.

The petition is demurred to for (1) want of jurisdiction as to subject-matter; (2) misjoinder of parties plaintiff; (3) same, as to defendants; and (4) want of facts sufficient, etc. And cross-petitions are also demurred to.

If, as I apprehend, the grounds stated all involve as a fundamental proposition the objection to the jurisdiction of equity in the premises, I think the demurrer is not well taken. It is fairly clear from the petition that the object is to bring under judicial inquiry fraudulent acts rendering

voidable an award or finding regular on its face; and to invoke powers peculiar to equity—should the facts be found as alleged—to annul and set aside this award which is a vital condition as to legal rights depending upon it. In such a case the equitable jurisdiction of the court is clear beyond question and the demurrer as to the first ground must be overruled.

But it also appears that the award is the result of the joint and concurrent act of all the insurers; and its effect, if valid, is to fix a basis upon which all are to be made contributors, in proportion, to make good a common loss. All are therefore parties in interest, by virtue of this joint relationship to the award, in the relief sought to be obtained; namely, the annulment of the award as a condition of their liability. The same reasons that justify the joining of two as plaintiffs require the joining of all.

As the demurrer is said to search the record, it is sustainable upon the ground of defect of parties plaintiff, rather than misjoinder. Section 5005 of the practice code requires parties joined in interest to be plaintiffs, except where they refuse to join, in which event, upon proper allegations they may be made defendants (Section 5007). But this was not done. The status here clearly shows that the cross-petitioners in fact consent and should be joint plaintiffs in the petition. As cross-petitioners they are not properly in the case and the cross-petitions are subject to be stricken from the files, but are not open to demurrer since it is not, properly speaking, a misjoinder as to them, not being real defendants.

For the reasons given the demurrers will be sustained in part, as to the petition, and overruled in part, with leave to amend petition in — days; and overruled as to cross-petition. But as the situation requires a redrafting of the petition, including the cross-petitioners as plaintiffs, it is suggested that a more complete, succinct and exact averment of facts is desirable, showing more clearly the grounds of joint equitable relief and an appropriate prayer that the court may take cognizance of the matter and determine it as an entirety according to the facts as they may be found

upon final hearing, the plaintiffs submitting themselves to the jurisdiction for this purpose upon the theory that a court of equity having taken jurisdiction for one purpose will retain in the cause and administer full relief in the premises.

Demurrer sustained with leave to amend in _____ days.

Cabell & Kohl, for plaintiff.

Conner, Walker & Sparrow, for defendant.

STATE, EX REL WILSON, V. LEWIS, AUDITOR, ET AL.
DISSENTING OPINION.*

1. Contracts made with tax "inquisitors" under the statutes in that behalf are invalid so far as they are drawn to have a prospective operation. The statute contemplates past and not future omissions; and such contracts are only justifiable when limited to such collections as the treasurer is unable to make after a full and unsuccessful exercise of all powers conferred upon him by law. Such statutes must be confined strictly to past forfeitures and can not be enlarged by construction. Only when public officers have in good faith exhausted their powers is the employment of private assistance justifiable.

HOSEA, J.

The question here is whether the contract made by the county officers with Morgenthaler as "tax inquisitor," under R. S., Section 1343-1 to 1343-4, on Sept. 17, 1902, is valid as a contract relating to tax omissions occurring in returns subsequent to its date; in other words, whether said law authorizes contracts having a prospective operation.

The constitutionality of the law in question having been adjudicated, various other questions arising upon this or a similar contract with Morgenthaler were disposed of by

*Affirmed 74 O. S., —.

this court in *McGoldrick v. Lewis*, 12 O. D., 46; but upon a suggestion arguendo in that case the court declined to pass upon this question because not raised by the pleadings.

From the majority opinion in the present case, holding that such contracts may have a prospective operation, I am constrained, notwithstanding my high respect for the views of my associates on the bench, to dissent; *first*, because the language of the statute seems to me to preclude such view, and, *second*, because, if the language were susceptible of the construction indicated, the general policy of the law is against it.

The language of the statute is as follows:

"(1343-1) [*Authorizing employment of tax-inquisitors; their compensation.*] The county commissioners, county auditor, and county treasurer, or a majority of said officers in any county, *when they have reason to believe that there has not been a full return of property within the county for taxation*, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate," etc.

(1) As the power to make such contract is wholly derived from the statute, the conditions and limitations of the power specified in the statute must be given effect. The subject-matter with reference to which the power is given in this instance is defined in the opening sentence of the act, stating a contingency which is the condition precedent to the exercise of the power, namely:

"When they have reason to believe *that there has not been a full return* of property within the county for taxation, they shall have power to employ any person to make inquiry," etc.

This language has obvious reference to an existing condition growing out of a past fact; namely, a condition arising upon one of the previous annual returns required by law.

The ordinary canons of construction require us to refer all relative words and expressions that follow later in the sentence, back to this dominant subject-matter; namely, to the certain specific return, made under the law, which the designated officers have reason to believe is not full and complete. So that the subsequent words, "*any omissions*" and "*any property improperly omitted*," refer to omissions existing in the return already made; and there seems to me no warrant in the language of the act for any other interpretation.

(2) In tracing the history of the statute, I find nothing to suggest any intention of the legislature to extend the power of contracting to possible future omissions. The original statute of 1880 (77 O. L., 205) confined its operation to omissions occurring prior to the passage of the act. In the special act of 1885, relating to Hamilton county (82 O. L., 152), the language is: "Any property improperly omitted," which is a common mode of expressing an existing condition, and does not refer to a future possibility. In the present act, passed in 1888 (85 O. L., 170), the limitation is still more specific by stating a condition precedent, namely, "when they have reason to believe that there *has not been* a full return," etc., which necessarily relates to a past event constituting an existing condition with sole reference to which the power is granted.

(3) Neither do I find in the opinions of the courts upon analogous statutes any support for the enlargement of the present statute by construction.

A question very similar to the present one arose before me in the case of *The State, ex rel, v. Gibson*, under the statute authorizing employment of a private individual to assist the treasurer in the collection of delinquent and forfeited taxes. The court held that the contract must be confined strictly to past forfeitures, which was affirmed by the higher courts. *State, ex rel, v. Gibson*, Court Index, July 23, 1903; affirmed in General Term, 49 O. L. B., No. 27, p. 513; affirmed by Supreme Court, 70 O. St., 424.

A clearly analogous case is that of *Commissioners v. Arnold*, 65 O. St., 479, based upon the statute authorizing

employment of assistance in the collection of delinquent chattel taxes. The Supreme Court lay stress upon observance of statutory conditions, and incidentally lay down a principle having a pertinent application to the present case. In the opinion it is said:

"Statutes enacted for the protection of the public revenue are, usually, not merely directory but mandatory. * * * Each delinquent list must be read, and an employment made to collect the same; but there can be no employment of collectors to collect future lists. *The employment of such collectors can not be turned into an office to be held to the end of the treasurer's term, or for any definite period.* His employment is to collect the delinquent list which has been read, or some part thereof, and when that is done his employment ends."

While the opinion is, perhaps, confined to a discussion of the particular law, yet it is impossible to read its clear and forcible language without feeling that beyond its particular application, the court is stating, in effect, a rule of public policy inconsistent with any enlargement of such powers by construction to include future contingencies; and the clear intimation is that such construction would create an office auxiliary to that of the elective office, for the performance of duties with which the officer is charged by general laws.

(4) The foregoing considerations suggest a broader view involving questions of a general public policy.

There can be no question as to the general purpose of our system under which all duties of a public character are assigned to duly elected public officers. In the matter of taxation, the citizen is required, under suitable penalties, to return his property for taxation to assessors who have power to correct returns and supply omissions, as to which the auditor has full power of investigation. The auditor is also given a special compensation to bring omitted property upon the duplicate.

I do not concede that the duties of the auditor are perfunctory or merely clerical. In *Probasco v. Raine, Audi-*

tor, 50 O. St., 378, the Supreme Court has spoken upon this subject as follows (391):

"To have equality in taxation all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services either by fees or salary. The Legislature has full power under the Constitution to say what officer shall perform such duties and in what manner he shall be paid. It has enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in Section 1071," etc.

Contracts of the nature here in question find their justification in the increased complexity and amount of modern business interests and investments and the facilities thereby afforded for escaping taxation; and, so far as they are confined to residual matters which the ordinary public officers have failed to reach and accomplish, after diligent efforts made in good faith to discharge their official duties in the premises, the employment of private assistance is proper and reasonable. Such seems to have been the view of courts in passing upon analogous contracts; but they have confined them strictly to such residual matters. To go further and enlarge the power to include future contingencies, opens a door to obvious evils that a correct public policy must avoid. It is a step backward in the direction of farming out the collection of the public revenues to private interests, that history warns us against; and I find no authority in this case for supposing that it was the intention of the Legislature to take this step.

For the reasons given, I think the demurrers should be overruled.

Theodore Horstman, for plaintiff in error.

Alfred B. Benedict, for defendant in error.

JOSEPH NELKEN V. HARRY M. FOSTER, ET AL.

1. Sections 4270 and 4273 of the Revised Statutes relating to recovery of money lost in gaming, wagers, etc.—the *first* providing that within six months the loser may sue, and the *second* that if the loser do not sue within the time specified any person may sue—are not mutually exclusive. The latter section by the term “any person,” includes also the loser; and the first section is therefore not a statute of limitation.
2. It is sufficient in suits under this law to show the aggregate amount of losses within specified dates without proving each particular amount and date or the particular agent or proprietor to whom each sum was paid or lost.
3. A plaintiff in such actions need not aver nor prove that he lost money in nor describe the gambling schemes in which he participated.

HOSEA, J.

Opinion upon motion to make petition definite.

The petition alleges that plaintiff lost and paid to defendants, who are alleged to have been engaged in a business of gaming in stocks and grain, diverse sums of money between April 15 and December 2, 1904, inclusive, upon certain unlawful bets and wagers, the sums aggregating \$1,200, for which he asks judgment.

The motion is to compel plaintiff to set forth the dates of the several alleged losses and payments.

The ground of the motion, as claimed in argument by the mover, is that Section 4270 of the Revised Statutes, which authorizes this action, limits the right of suit to six months from date of loss or payment, which limitation would exclude all payments made within six months prior to December 24, 1904, on which day the petition was filed and that, therefore the petition should be correspondingly confined in its allegations.

The general statute under which the suit is brought comprises the series of sections from 4269 to 4276, inclusive, constituting Chapter 5, Title 5, of the Revised Statutes, declaring gaming contracts void and providing remedies upon them.

The common law gave no remedies upon such contracts and refused to aid either party. The only remedy, therefore, is the statutory one. Section 4270 provides that within the six months after the loss or payment the loser may sue; and if this were the sole provision in respect of remedy, the contention of the defendant in this case would be good; but that is not the sole provision. Section 4273 provides that if the loser does not sue within the time specified, any person may sue.

The defendant claims that the word "person" in the last named section must be held to mean any *other* person;—in other words, that the two sections (4270 and 4273) are mutually exclusive. But this proposition is unsound. The law in question creates a right where none before existed; and in the creating of such a right no reason appears for imposing a limitation of time upon the party chiefly concerned where it is given without limitation to others who may not be concerned at all. Moreover, it is a general principle that remedial statutes are to be interpreted with a view of effectuating the purpose intended by the Legislature; and in applying these principles I must hold that the last named section (4273) in specifying "any person" includes the loser. It therefore follows, as the meaning of the statute, that during the first six months after the loss or payment the loser only may sue; but from that time forward the lists are open to others as well, including the loser. *Hoss v. Layton*, 3 O. S., 353.

But even considered upon the ground of indefiniteness as to dates, items, etc., I think the motion is not well taken. Section 4272 of the same law provides that it shall be sufficient in such cases to allege that the defendant is indebted, or received to plaintiff's use, etc., without setting forth special matter, and under this section it has been held sufficient to show the aggregate amount of losses between specified dates without proving each particular amount and date or the particular agent or proprietor to whom each sum was paid or lost. *Lear et al. v. McMillen*, 17 O. S., 464.

It has also been held that the plaintiff need not aver and prove that he lost money in the gambling schemes in

which he participated, nor describe the particular games or schemes in which he played. *Vincent v. Taylor*, 60 O. S., 309.

The motion, therefore, must be denied and it is so ordered. Motion denied.

S. H. Hurtig, for plaintiff.

G. H. Warrington, for defendant.

MAMIE MILLER V. THE CINCINNATI TRACTION CO.

1. The question of contributory negligence involves not only the immediate act of the party charged, but surrounding circumstances influencing the motive and touching its propriety, and is, therefore, in most cases, a question for the jury.
2. Especially is this true in the case of children whose immature judgment lessens the *quantum* of care required and correspondingly increases that of the injuring party.
3. The doctrine thus rests, in the case of children, upon a balancing of modified obligations, so that, under Ohio law, a court would not be justified in imputing negligence to a child as matter of law but must leave the question to a jury upon the evidence under a suitable charge.

HOSEA, J.

Heard on motion for new trial.

The argument upon this motion is chiefly upon the proposition that the verdict is against the weight of the evidence. It is claimed that negligence on the part of the plaintiff is clearly shown—so clearly indeed as that the court should have granted the motion to direct a verdict at the conclusion of plaintiff's testimony. A minor objection is based on instructions to the jury in the general charge on the subject of contributory negligence which are apparently contradictory; but this is an error in the stenographic notes due to a misunderstanding of a word used by the court, which will be corrected in the bill of exceptions.

The plaintiff in this case was a child between fourteen and fifteen years of age at the date of the accident. She approached Westwood avenue coming westwardly upon a bridge leading into it at or just north of Shadwell street. She testified that she saw the car coming south a block and a half away; and as she reached the end of the bridge she again looked and saw the car three doors above the saloon at the north corner, and saw the motorman "turn two things," and she thought the car was going to stop because it "kind of shook as if it was going to stop."

There were several persons waiting at the crossing to take the car, and she hurried across toward them in a diagonal or southwesterly direction for the same purpose, because, as she testifies, "the car always stopped there." She did not herself signal to the car, because she "thought it was going to stop." When she reached the middle of the southbound track the car was right upon her and she "did not know what to do"—and practically made no effort to escape injury.

Dr. Tomlinson and his wife, who stood waiting for the car at the crossing and witnessed at short range all that occurred, confirmed her statements, with the additional information that the motorman threw off his brake and turned on the power (after having been shut off) while plaintiff was crossing the street and "had almost reached the track"; and that when the car struck her she was carried about twenty feet, and the car ran about eighty feet after hitting her. Both the plaintiff and Dr. Tomlinson testified that no gong was sounded by the motorman.

No testimony was offered on the part of the defendant, but a motion to instruct a verdict was made and argued upon the theory that the testimony raised a presumption of contributory negligence on the part of the plaintiff which was not overcome. This motion was overruled, and the question now to be considered is practically the same.

I have given the case a careful re-consideration, aided by notes of the testimony, including the opening statements of counsel.

Undoubtedly the plaintiff saw the car approaching, and attempted to cross the track ahead of it. It also clearly appears that she planned her action in crossing the street upon the theory that the car would stop because (1) it usually did stop there; (2) others were waiting there in the position of persons expecting to take passage upon it; (3) the motorman did shut off his power and set his brake as if he intended to stop there. Acting upon these evidences, she started diagonally across, having her back partly turned toward the approaching car. When she started across, the car was about one hundred and twenty-five feet above the crossing where she expected it to stop.

It is also equally clear, inferentially, that the motorman saw the child starting diagonally toward the crossing and hurrying across the track toward those already standing at the usual stopping-place in the position of persons expecting to take passage upon the car when it should stop. In fact, conditions as he must have seen them should have suggested to him that he was expected by all these people to stop his car at that crossing; and it appears that his first intention was to do so, for it is shown that just above Shadwell street he threw off the current and applied the brake, resulting in a slackening of speed visible to those in waiting and to the girl crossing. The plaintiff also testifies that believing from these acts of the motorman and the visible "shaking of the car, that it was going to stop," she started across; but she says also that no gong was sounded and that "if it had been sounded she would not have crossed," as it "would have indicated that he was not going to stop and she would not have crossed." It was also in testimony that the motorman did not cry out nor warn the girl when she was near or actually upon the track and the car in close proximity.

The reason why the motorman did not stop was given in counsel's opening statement to the jury, namely, that the cars had been delayed by a fire and "this car was not making any stops at crossings"; but there is nothing in the testimony to show that this was known to plaintiff or to those

in waiting, and a contrary inference is to be drawn from facts affirmatively shown.

Under these circumstances the question of negligence seemed to the court then—and with even greater force now—to be one peculiarly appropriate for the action of the jury under instructions as to three principal rules of law in addition to those general considerations applicable to all cases of accidents at street railway crossings. These special matters were: first, the general question of contributory negligence in the case of one who crosses a track ahead of an approaching car; second, the question of contributory negligence arising from a situation involving immediate peril; and third, the fact of the minority of the plaintiff as an element in determining the general questions of negligence.

In the charge on these points the court had in mind as bearing on the first of these questions the principles of the Snell case, wherein our Supreme Court emphasizes the equal rights of the public in the use of the streets, and in effect discards any claim of superior legal right on behalf of the street railways based upon the assumed necessities of rapid transit, or to a general right of way as against a private citizen. In respect of crossing tracks ahead of cars, the court says:

"It is not inconsistent with the conclusion that ordinary range of vision would probably have enabled him without turning his head or eyes up the track to see a car in time to avoid it had the car been running at a safe rate of speed; and we think one so crossing could not be asked to extend his observation beyond that distance within which a car proceeding at a customary and reasonably safe speed would threaten his safety." (*Cincinnati St. Ry. Co. v. Snell*, 54 O. S., 197, 209.)

Following this is a commentary upon the facts of the case that may be with perhaps equal propriety said of the facts here in issue, namely:

"Taking the effect of the evidence as a whole, one thing which is tolerably clear is that if the car had been running at a reasonably safe speed, and proper warning had been

given, Snell would not have been injured. The evidence pro and con was to be weighed, and the tribunal for that purpose was the jury and not the court upon the motion."

It may fairly be said to be apparent in the case at bar that if the motorman had allowed the slackening of speed which he initiated when approaching Shadwell street to continue—in other words, if he had not on approaching the crossing released the brake and thrown on the current—the plaintiff would not have been injured. She would have had ample time to get across to a place of safety as she intended.

The court also had in mind in giving the charge the utterance of the circuit court as a gloss or interpretation of the principle of the Snell case as follows:

"It is not negligence for a person to attempt to cross a street car track ahead of an approaching electric car when the car is so far away that by the exercise of reasonable care it might be stopped before reaching the place of crossing." (*Toledo St. Ry. Co. v. Westenhuber*, 22 C. C., 67. Affirmed in 65 Ohio St., 567.)

The question thus presented relates generally to the act of attempting to cross the street or track, but it also appeared that when the car was in dangerous proximity, the child, being upon the track, appeared confused and made no effort to escape. It seemed proper to charge, with reference to circumstances of immediate peril, that contributory negligence can not be predicated upon the fact that one in the immediate presence of threatened danger fails to exercise ordinary care to avoid injury. This is a principle recognized everywhere, and is particularly set forth in the Kasson case, 49 Ohio St., 239.

The third and last important question,—involving a principle modifying the application of the other two,—has relation to the youth of the plaintiff. On this point the charge was based on the Corrigan case in 46 Ohio St., 283, and the Mackey case, 53 Ohio St., 370 (383)—the principle being that a child is presumed to possess only such discretion as is common to children, and is to be held only to the exercise of such care as is reasonably to be expected of chil-

dren of like age and capacity. The question at issue, as it seems to me, in such cases involves not alone the immediate conditions of the act of a plaintiff but surrounding circumstances influencing the motive for the act and touching the question of its propriety, and for these reasons to be one necessary to be submitted to a jury. However the act might be viewed, had the injured person been an adult, the element of youth presents a modifying factor that should be left to a jury under the Ohio rule of ordinary care. Indeed, in formulating the rule applicable to children, the Supreme Court in the Corrigan case recognizes the confused state of the law resulting from the application of conflicting rules in different jurisdictions (page 288), and adopts a conservative doctrine between the extremes which necessarily involves a consideration of circumstances in each case. And this, as it seems to me, is necessarily a matter for the jury, and it is so declared in *Railway v. Mackey*, 53 Ohio St., 370. This is emphasized by the corresponding rule that as the quantum of care required of a child is diminished, that of a defendant to avoid injuries to children is increased (see Snell case, p. 291). The doctrine is thus made to rest entirely upon a consideration of circumstances and a balancing of modified obligations; so that, under the Ohio law, there would seem to be no room for a view that under any circumstances the court would be justified in determining it, in imputing negligence to a child as matter of law.

It will be further apparent that, on a question of this nature, where our state rule is so clearly and discriminatively established, decisions from other courts are of little value unless shown to be based upon the same rule. In Massachusetts, for example, the rule permits the court rather than the jury to determine the responsibility as a matter of law (see Sherman & Redfield on Negligence, paragraph 73a).

Upon the whole case I am satisfied that the questions presented were properly left to the jury, and I do not think I am justified in disturbing their verdict for the reasons presented in this motion for a new trial, nor for any

others that have appeared upon review of the trial incidents.

Motion denied.

Hoffman, Bode & Le Blond, for plaintiff.

Miller Outcalt, for defendant.

MARTIN MACK V. ALBERT ACKERLINE.

Although a prior judgment may not be a technical bar to a subsequent action, yet a fact in issue between the parties and necessarily involved in the former judgment is *res adjudicata* in a collateral suit between the same parties.

Per Curiam.

Error to Special Term.

The findings of fact entered by the court below cover grounds of affirmative relief sought in this suit, but which were litigated as defenses in a prior action between the parties in forcible entry and detainer, brought before a magistrate, with a resulting judgment adverse to the plaintiff in error here—which judgment was in due course affirmed by the Common Pleas and by the Circuit Court (see 50 O. L. B., No. 14, p. 133).

Granting that under R. S., Section 6610, said former judgment is not a bar to the bringing of this suit, yet we regard it as none the less true that a fact in issue in a court of competent jurisdiction and duly determined, is *res adjudicata* in collateral suits between the same parties.

Where the record of a case shows that a question must necessarily have been determined before the judgment which was rendered, it is conclusive in all subsequent litigation upon the fact that the question has been litigated and decided, and the party may invoke that decision upon the

principle of *res adjudicata*. *Hickson v. Ogg*, 53 O. St., 361; *Kuneke v. Mafel*, 60 O. St., 1 (7).

Strictly speaking, the court below should, perhaps, have excluded evidence of the facts so adjudicated, but if this be error it can not prejudice the plaintiff in error here. The proper forum for relief was the court of common pleas during the pendency of the former action.

To hold otherwise would compel this court to sit in review upon the action of the magistrate, the common pleas and the circuit court, which is manifestly improper. *Brenner v. Cist*, 6 N. P., 1; *Petsch v. Mowry*, 13 O. D., 401.

A court can not do by indirection what it is not authorized to do directly.

Judgment affirmed.

Closs & Luebbert, for plaintiff in error.

Norwood J. Utter, for defendant in error.

CHRISTIAN MUHLHAUSER V. THE CINCINNATI TRACTION
COMPANY AND THE CITY OF CINCINNATI.

1. The owner of property abutting on a street has an easement in that portion of the street lying in front of his premises as an incident of tenure, and he may use the same for any purpose that does not interfere with the rights of the public.
2. An abutting owner has a right of action in respect of his said easement for any interference with right of access, etc., that is a private injury not shared in common with all other owners; but in respect of a general obstruction to travel upon the street, the primary injury is to the public and suit must be prosecuted by the public authorities or by the citizen in his capacity of tax-payer if the public authorities refuse to act.

HOSEA, J.

Interlocutory opinion on motion for temporary restraining order.

The petition in this case seeks a perpetual injunction against the City and the Traction Company to restrain the laying of tracks on Winchell avenue, and the cause has been submitted as upon final hearing. It clearly appears, however, that the real issues are not properly presented by the allegations of the pleadings, and the latter are in need of reformation before the case can be fully considered and determined.

(1) The first cause of action is based upon a right or privilege alleged to have been granted to plaintiff in October, 1885, by the Board of Public Works, to place a wagon-scale platform in the street in front of his premises, with levers extending beneath the pavement into his grain warehouse. This is made an issue by the answer of the Traction company denying the validity of such grant as one creating rights in the plaintiff.

Under the facts shown and the law as applicable to them, this is a false issue and entirely immaterial. The real issue rests upon the owner's easement in that portion of the street lying in front of his premises, which is an incident of his tenure. This is made clear as the law of Ohio in a long and consistent current of decisions. The principle is tersely stated in one of the latest (*Gibson v. Ebding*, 70 O. St., 298), as follows:

"The land (of a roadway) remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the easement" (granted to the public). (See 70 St., 113 (118); 58 St., 651; 38 St., 41; 14 St., 523; 7 St., 460, and the very recent ruling in *City of Columbus v. Penrod*, 73 St., —.)

Elster v. Springfield, 49 St., 82, cited in argument, has no application to the present case except to confirm the principle stated. The grant or permission there had relation to the street as a whole, and the easement rights of an abutting owner were clearly distinguished (p. 96).

(2) The statement of the second cause of action is prolix and confusing because of failure to distinguish between things legally distinct, in these particulars, namely:

(a) An abutting owner may sue to prevent injury to the immediate right of access to his property under his easement—which is a private injury and properly the subject of a private action; but in respect of a general obstruction to travel upon the street, the primary injury is to the public for whose use the street as such is dedicated. The latter suit, therefore, must be brought by the city solicitor or by the citizen in the capacity of a tax-payer under the law in that behalf. See for illustrations of the distinction: *Lyon v. Fishmongers*, 1 L. R. App. Cas., 662; *Brayton v. City of Fall River*, 113 Mass., 218 (cited in *Branahan v. Hotel Co.*, 39 O. St., 333).

(b) The petition alleges that the construction of the proposed tracks is for the private benefit of the railway company, and not for public benefit; yet at the same time it is in effect admitted that it is being done by grant of the city council, and the legality of said grant is not put in issue. In the absence of a direct issue, it is questionable whether a court should imply one as against presumptions in favor of official action under laws relating to the general subject-matter. If it is intended that the court shall consider this phase, the issue should be in some form clearly made.

(3) It is manifest from the testimony that the Cincinnati Street Railway Company, lessor of the Cincinnati Traction Company, should be made a party defendant, inasmuch as the ordinance, by virtue of which the proposed work is being done, grants rights to the two companies jointly, and it is a necessary inference that the work is being done by them jointly, or for their joint benefit.

Enough appears in the case thus far to justify the issuing of a restraining order as prayed, *pendente lite*, and an entry in this behalf may be made; but, as the pleadings require amendment for the reasons and in the particulars above set forth, the entry should also include an order for their reformation—the petition within fifteen days; answer within ten days thereafter; and reply within five days thereafter; and continuing the further hearing of the cause for

thirty days, with leave to both sides to introduce further testimony.

Jerome D. Creed, F. P. Muhlhauser and W. C. Muhlhauser, for plaintiff.

Smith Hickenlooper and Outcalt & Foraker, for the Cincinnati Traction Co.

Walter A. DeCamp, Assistant City Solicitor, for the City of Cincinnati.

RUDOLPH KLEYBOLTE ET AL. V. THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY.

1. The statute (R. S., Sec. 3133), rendering void all capital stock, bonds, notes or other securities of an incorporated company, purchased by a director thereof at less than the par value of the same, does not apply to the bonds, etc., of another independent company, acquired by the first named company in the ordinary course of its business.
2. While all transactions of directors in their own interest with the property and affairs of their company are to be closely scrutinized, they may be upheld where no element of deceit or unfairness is shown; and more especially is this true where the circumstances render it at least possible that the transaction may involve a benefit to the holding company.

HOSEA, J.

Heard on demurrer to cross-petition.

To a petition declaring upon promissory notes of the defendant to the amount of forty thousand dollars, the defendant files a cross-petition alleging that on July 7, 1904, it was the owner of thirty-three hundred \$1,000 bonds, one of the obligors of which bonds was the Toledo Railway & Terminal Company; that said bonds were secured by mortgage to the Commonwealth Trust Company of St. Louis; and that payment of the principal and interest of said bonds was guaranteed by the defendant and by the Pere Marquette Railroad Company, jointly and severally; and that

thereafter, in consideration of said guaranty, the plaintiff firm by contract with defendant purchased twenty-five hundred of said bonds at \$975 each, with accrued interest, said price being less than the par value of the bonds.

The cross-petition then avers that Rudolph Kleybolte, one of the partners in the firm of Kleybolte & Company, was at the date of said transaction one of the directors of the defendant company, and that by reason of the premises the said parties, partners, etc., became indebted to it in the sum of \$95,000, with interest, being the difference between the price paid for said bonds and the par value thereof, which sum the defendant pleads as a set-off to this action, and prays judgment for the difference between said sum of \$95,000 and the amount sued for. The sufficiency of this cross-petition is challenged by a general demurrer.

A set-off is defined in our practice code as follows:

“5071. A set-off is a cause of action existing in favor of a defendant and against a plaintiff, against whom a several judgment might be had in the action and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract.”

The cause of action set forth in the cross-petition is primarily against Rudolph Kleybolte, one of the plaintiff firm, and is claimed to arise out of his relation and capacity as director of the defendant company under a section of the Revised Statutes of Ohio relating to railroad companies, reading as follows:

“Sec. 3313. All capital stock, bonds, notes or other securities of a company, purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void.”

The theory of the cross-petition, as advanced in argument, is that the bonds in this case became, by the guaranty, “securities of the company”; that Rudolph Kleybolte, one of the plaintiffs, being a director, and Section 3313 having set a price upon such bonds for less than which a director can not buy them, the director, having bought such bonds

at less than the statutory appraisal, the law raises a promise to pay for them at the statutory price.

The question as presented upon this demurrer rests upon the colorless and bare allegation of a purchase at a discount, and upon the wording of the statute. No element of secrecy or unfairness is pleaded and the case rests simply on the unlawfulness of the act of purchase *per se*. The statute simply makes a sale to the director at a discount unlawful in terms prescribing a penalty therefor, namely, that the "security" (being a chose in action involving an obligation of the company) "shall be void," that is to say, unenforceable against the company.

It is claimed that the word "void" as used in the statute means "voidable at the election of the company," and reference is made by way of illustration to the construction early placed upon the statutes relating to conveyances in fraud of creditors; but this rests upon quite a different basis and involves essentially different reasoning.

Section 3313 in its original form was the second section of an act passed in 1852 "relating to the sale of bonds of railroad companies," etc., and reads as follows:

"Sec. 2. No director of any railroad company shall, either directly or indirectly, purchase any shares of the capital stock or any of the bonds, notes or other securities of any railroad company of which he may be a director for less than the par value thereof; and all such stocks, bonds and notes or other securities that may be purchased by any director for less than the par value thereof shall be null and void."

In the subsequent revision of the statutes this section was condensed to the present form as first quoted above, which involves no change of meaning, as will be seen on comparison. Section 1 of the original act provided that the directors of any railroad company authorized to borrow money and to execute bonds or promissory notes therefor were "*hereby authorized to sell, negotiate, mortgage or pledge such bonds or notes, as well as any notes, bonds, scrip or certificates for the payment of money or property which*

*said company may have heretofore received or shall hereafter receive," etc., "for such prices as in the opinion of the directors will best advance the interests of the company * * * and the sale shall be valid if sold at a discount, and such securities shall be as binding as if sold at their par value."*

Thus reading Section 3313 in its place and sequence, the intent of the lawmaking power is made manifest, and it becomes clear that the statute as a whole and in its parts has reference to the *obligations of a company issued by itself to raise money or to acquire property for the accomplishment of purposes of its creation, and not other property acquired in the ordinary course of its business* (*Rhodes v. Woldy*, 46 O. St., 234). The rights of corporations with respect to their own issues of stock and other securities have always been jealously guarded both by the statutes and by the courts, but it does not follow that the same strict rules apply arbitrarily to acquired property. It is obvious that the Legislature would have no power to make the bond or other security of a third party void under the circumstances of the present case.

If this construction of the statute is correct, the claim that the bonds become the securities of the defendant company by the guaranty is also untenable. The bonds still remain the bonds of the issuing company, secured primarily by mortgage upon its own property. The obligation of defendant company in relation thereto is purely collateral and secondary, and shared with another. Its obligation, moreover, is entirely contingent and could not form the subject of a set-off in its own behalf. *Follett, Adm'r, v. Buyer*, 4 O. S., 587 (592).

And it would seem to follow that an endorsement of guaranty could not impress upon the bonds such a character, or such a relationship to itself, as to bring them within the spirit of the law, as it certainly does not bring them within the letter. Nor can the terms of such law operating in respect of direct issues of the company itself be said to fasten an arbitrary value upon securities of another company acquired in the ordinary course of business.

It is difficult to see how under any construction of the statute, or by the application of any rules recognized by courts of law or equity, the transaction here can be said to raise a contract by implication upon which a set-off may be founded.

The case of *Norden v. Jones*, 33 Wis., 605, which may be taken as a type of others on which reliance is placed in argument, was an action of trespass *quare clausum fregit* to recover damages to the realty for a wrongful entry. It is familiar law that in cases of such a nature the tort may be waived and recovery be had upon the implied agreement to pay for the damage wrongfully done. But how can a tort—which is a civil wrong independent of contract—be predicated upon an act in which both parties participate and to which both freely consent, and where no fraud is charged? It must be conclusively presumed here that both parties knew the law, and it is manifest that both participated with full knowledge in the act out of which liability claimed arose.

If the act be unlawful, the case is analogous to that of money lost at gambling, in which case the statute in that behalf gives to the loser a right to recover the money lost. But this right is treated as a *penalty* and barred in one year by limitation (*Cooper v. Rowley*, 29 O. St., 547). Moreover, it has been held that directors who are themselves wrongdoers are disqualified from acting as the representatives of the company in any litigation for the correction of the wrong in which they have participated. *Knoop v. Bomrich*, 49 N. J. Eq., 82.

In the absence of any allegations of fraud or deceit, a participant in such a transaction can not appeal to the equitable doctrine of "natural justice" as creating an implied obligation in contravention of an express contract fully executed and of which he has received the benefit. In all the cases upon the subject, including those cited in the briefs, the working out of justice through equitable principles is based on the fact that the director accomplished by indirection and deceit that which was a breach of trust or fraud upon the company he represented, or where sim-

ilar results were attained by conspiring directors in fraud of the rights of stockholders or of third parties dealing with the corporation.

But it is held in many jurisdictions—and the rule is general—that, subject to the condition of strictest good faith and a full and fair disclosure of interest, directors have power to enter into fair and open contracts with their companies. *Cavendish Bentick v. Fenn*, 12 App. Cas., 652; *Robinson v. McCracken*, 52 Fed., 726; s. c. aff'd by C. C. App. (U. S.), 57 Fed., 375; *Kaye v. Craydon Tramways Co.*, 67 L. J. Ch., 222; *Ft. Wayne Rolling Mill v. Hill*, 174 Mass., 224.

And subject also to the right of the corporation to avoid a sale by reason of the fiduciary relations, if exercised within a reasonable time after the facts are known or can with reasonable diligence be ascertained (*Twin Lick Oil Co. v. Marburg*, 91 U. S., 587). But upon the allegations of the cross-petition here, not only is there a total absence of the slightest intimation of bad faith or concealment, but the nature of the transaction implies full knowledge of both participants, and it is quite conceivable that such a transaction, so far from injuring or defrauding the company may have been of great benefit to it, and from aught that appears may have occasioned loss rather than profit to the purchaser.

In any aspect of the case, it does not appear that a right of recovery exists in favor of the company that could form the basis of a several judgment, nor any ground of set-off; and, therefore, the demurrer must be sustained. The court is not, however, unmindful of the rule that directors, as agents occupying a fiduciary relation to the corporation, should not be permitted to occupy a position in conflict with the interests they represent, and will be prompt to condemn any arrangements by directors to secure to themselves an undue advantage at the expense of the company whenever properly brought before it for consideration. *Wardell v. R. R. Co.*, 103 U. S., 651 (Field, J.); *Anderson v. Carkins*, 135 U. S., 483.

The demurrer is sustained; and as the pleadings admit the indebtedness to plaintiffs, judgment may be entered for plaintiffs in accordance with the prayer of the petition.

Demurrer to cross-petition sustained and judgment for plaintiffs, with costs.

H. D. Peck, for demurrer.

Edward Colston, Lawrence Maxwell, contra.

ALBERT H. CHATFIELD V. THE CITY OF CINCINNATI.

1. A purchaser of platted lands is bound by recitals of the plat in existence though subsequently recorded.
2. The holder of a perpetual leasehold, if duly authorized by his deed of conveyance, may make a lawful dedication binding on the holder of the fee.
3. A common law dedication if properly made is equally effective with a statutory dedication.
4. A common law dedication of lands insures to a municipality subsequently organized thereover. The public is an ever-existing grantee capable of taking dedication for public use.
5. Actual acceptance and opening of a dedicated street not necessary to perfect the dedication, nor are *laches* imputable, until circumstances arise in the growth of a municipality calling for such action.
6. An indorsement of reservation by a purchaser of platted lands who subsequently replats, is not effective as to prior dedicated streets, where the prior dedication had become effective by sales of lots, etc.

HOSEA, J.

Plaintiff avers ownership and possession of fifty-two feet, more or less, on Saunders street, Cincinnati, extending northward to Estelle street, and improved by a dwelling-house. He claims that the city has entered upon his said lot and constructed and maintains a public stairway and plank walk thereon between Estelle and Saunders streets to his irreparable injury, and prays a perpetual injunction.

The city by answer claims 23 feet of the east 25 feet of said premises through dedication by plaintiff's predecessors in title; and issue is taken by a general reply.

Waiving the obvious criticism upon the form of the action, and the allegations of the petition, the questions will be considered as though properly pleaded and as upon issues properly raised, in view of their public importance.

Without going into unnecessary prolixity of detail, it appears that plaintiff derives title to the premises—described in his petition as a lot “52 feet more or less on Saunders street”—through two deeds, namely:

(1) *January 24, 1900*, from O'Hara, assignee of F. G. Huntington, to land described by metes and bounds “commencing at the northwest corner of Saunders and Sycamore streets,” etc., “being the east part of lot No. 82 and the south part of lot No. 81 of Wm. C. Huntington's subdivision”—elsewhere referred to by its record in Hamilton county records.

(2) *December 30, 1901*, a release and quit-claim to a strip described by metes and bounds beginning on Saunders street, at the southeast corner of lot No. 82 of the W. C. Huntington subdivision, extending twenty-five feet east on Saunders street to southwest corner lot ten of the subdivision of Frederick G. and Frank Huntington, and extending back to Estelle street one hundred and forty feet, and containing the following further reference:

“Being the same property which is sometimes referred to on the records of said county as part of Lewis (also called Sycamore) street, and which was expressly excepted by said William C. Huntington from dedication, and reserved to himself in his said plat,” etc.

By stipulation of counsel, it is admitted that the said strip of 23 (of the 25) feet has not been on the tax duplicate or taxed since 1884; and that the dwelling on lot 82 encroaches two inches in front and six and seven-eighths inches in rear upon the twenty-three feet constituting Lewis (or Sycamore) street; and it appears in testimony that

said dwelling was built in about 1883 by Fred. G. Huntington, and that its east wall was built with a dozen windows opening upon the strip called Lewis (or Sycamore) street.

It thus appears, contrary to the inferences of the petition, that the improvements upon the property were not placed upon the lands described therein as a whole, nor with reference to their condition as an entire tract, but distinctly upon a specified portion only and bounding upon a platted street, which street is the subject of controversy here; and these facts are made plain in the deeds whereby plaintiff acquired title.

The testimony of the records upon the question at issue is as follows:

(a) As early as 1828 a plat was recorded in Deed Book 29, page 17, of a subdivision of part of the estate of Thomas Hughes, lying north of the corporation line of Cincinnati, made by trustees and legatees under the will of said Hughes, deceased, and approved by the city surveyor. This plat (Exhibit 1) shows lots bounded on Main street on the west and Sycamore street on the east, as extended northwardly; and refers to said streets in its descriptions.

(b) In 1836 (Deed Book 62, page 39) is recorded a perpetual leasehold, by the trustees of Thomas B. Hughes, deceased, to Eden B. Reeder, of property including that last above noted, and more particularly described by boundaries, the eastern boundary described being: "land now owned by Lloyd Wayne, and a road or street being an extension of Sycamore street," etc. By the terms of this indenture it was provided that said Reeder, his heirs and assigns were to have the privilege of "subdividing said property into lots, opening streets and alleys, and dedicating the same for public use," etc. (Exhibit 9.)

(c) Later in 1836 (Deed Book 62, page 41) appears an assignment of the "lease and the premises contained" by Reeder to McCleany and Bissell, with certain reservations bounding on Sycamore street extended," and others "on said Reeder's continuation of Sycamore street"; and all

"subject likewise to the streets and alleys dedicated to public uses by said Reeder in his subdivision of the premises," etc.

(*d*) The plat of Reeder's subdivision, referred to in the preceding item (*c*) was put on record Feb. 3, 1838 (Deed Book 65, pages 374-5). This plat covers various tracts derived from the Hughes estate and extends Sycamore street northward, with the following remarks:

"In extending Sycamore street northward to the end of the premises a strip of two feet in width is reserved between that extension and the east line of the premises, until the owner or owners of the property adjoining shall lay out an addition of twenty-five feet in width so as to make a fifty-foot street for such parts on the whole length as shall be so added and laid out," etc.

Also: "The streets, alleys and avenues are set apart and dedicated as a right of way for public use forever," reserving a right of alteration for ten years where no sales shall have been made. This plat was signed and duly acknowledged by Eden B. Reeder before John Burgoyne, associate Judge in and for Hamilton County, Ohio, on February 4, 1838.

(*e*) Next appears in 1841 (Deed Book 82, pages 419-20), a plat and accompanying description of Greenbury Dorsey's division made by Salmon P. Chase, his trustee, and confirmed and ratified by G. Dorsey by C. Byrne, attorney in fact (his power also being recorded, Mortgage Book 83, page 73).

This plat covers the same property shown in Reeder's subdivision (item *d*) and differs in detail chiefly with regard to certain new cross-streets laid out from Sycamore street west, but makes no change whatever as to Sycamore or Lewis street. Eden B. Reeder also endorses on said plat his acceptance and confirmation of the same by virtue of his reserved right of alteration before referred to. The plat is also endorsed as accepted by certain intervening purchasers.

(f) Next is presented a conveyance in fee simple, dated May, 1867 (Deed Book 344, page 96), from the surviving heirs of John D. Saunders, deceased, to W. C. Huntington, of lots D, E, F, G, H and I, of lots on the Dorsey plat as made by S. P. Chase, trustee" (item *e*, *ante*), "subject to the conditions of a lease by Chase to the ancestors of these grantors and of the lease made by the trustees of Thomas Hughes to Eden B. Reeder" (item *b*, *ante*).

(g) Next in order is a deed of release and quit-claim dated January 23, 1875, from the trustees of Thomas Hughes, to certain lands, among others that described as bounded on the west by Locust street, north by Mason street, east by lands of Holden, Thoms, Smith and Huntington, south by Saunders street: "said lot being shown as D, E, F, H and I, Dorsey Blue Plat, Hamilton County, Auditor's office."

(This, as will be seen, is the same property covered by item *f*, *ante*, the omission of lot "G," being doubtless a clerical error in the copy in evidence.)

(h) W. C. Huntington in the same year (1875) made a re-subdivision of the grounds thus purchased (Plat Book 4, pages 226-7), stating it to be "part of the lands subdivided by Chase, trustee of Dorsey, and known as the Dorsey Blue Plat." On the Huntington plat Sycamore or Lewis street is shown as an open street extending from Saunders street north to Mason; but in the general endorsement is a reservation, already quoted, of the portion between Saunders and Estelle—which is the portion in controversy here.

(i) In this connection, although out of order in date, should be considered a plat by W. C. Huntington, and approved and adopted by the Platting Commission July 30, 1895, showing the vacation by statutory proceedings of Sycamore street south of Saunders street, but incidentally showing Sycamore street north of Saunders as an open street.

(j) Lastly, and under this head, may be grouped certain deeds to various parties beginning with one in 1875 to lot 81 as "being part of the lands on the Dorsey Blue

Plat," and of other lots shown on the Huntington plat and also mesne conveyances of these lots—particularly of 81 and 82, described as bounded upon Lewis street (Sycamore).

Coming now to consider the probative value and effect of this record evidence, it must be conceded that the Hughes plat (A) of 1828 is of no significance except as showing an intention to continue Sycamore street north from the corporation line as a public street; and as explanatory of the subsequent plat of Reeder showing a further "extension" of the same northward.

The crux of the case is the next subsequent plat (D) by Eden B. Reeder. The record (B) shows that in 1836 the trustees of Hughes, deceased, executed a perpetual leasehold of the preceding and other property of Hughes' estate, including the general territory involved in the present controversy. The description of the property as contained in the indenture, is by a very general reference to boundaries and to a plat of record corresponding with the record of the Hughes plat (A). For present purposes we must assume—there being no evidence to the contrary—that the subdivision by Reeder, subsequently shown, covered the property actually conveyed. The significant feature of the conveyance in question is the specific authority given to Reeder to subdivide and dedicate in the following words:

"It is further agreed between the parties that said Eden B. Reeder, his heirs and assigns, shall have the privilege of subdividing said property aforesaid into lots, opening streets and alleys, and dedicating the same for public uses."

It appears from the recitals of the assignment (C) of parts of this leased property, that Reeder, very soon after acquiring the same, did make a subdivision, the plat of which was not recorded for two years later (1838). In view of the recitals of the assignment, however, the delay in recording was not material, since the assignment was made with reference to the plat and "*subject to the streets and alleys dedicated by said Reeder in his subdivision of the premises.*"

This point was long ago decided by this court in the case of *Gest v. Kenner*, 2 Handy, 87, wherein Judge Storer states the principle as follows:

"Though the plat stated in the deed might not have been recorded, the recital was evidence that a plat had been made and was then in existence, and the parties were bound by all the legal consequences of the dedication which the plat, when recorded, would establish."

The Reeder plat recorded in 1838, while it includes the property shown in the Hughes plat, also includes property northward thereof, and other tracts not involved here. This plat shows Sycamore street extended northwardly through the entire tract with an indicated width of twenty-three feet and with the boundary line of the tract shown as two feet eastward of same. The explanation accompanying the plat includes the following:

"In extending Sycamore street to the north end of the premises, a strip two feet in width is reserved between that extension and the east line of the premises, until the owner or owners of the property adjoining shall lay out an addition of twenty-five feet in width so as to make a fifty-foot street for such parts on the whole length as shall be so added and laid out";

And also the following:

"The streets, alleys and avenues are set apart and dedicated as right of way forever, * * * saving the right within ten years to change, alter or vacate any street," etc.

The claim of plaintiff that the Reeder lease was only to Sycamore street as a boundary, and therefore did not include the property in controversy, is not tenable. *Crane v. Buckles*, 1 N. P., 51 (aff. in 52 O. St., 613); *Gest v. Kenner*, *supra* (page 91).

The claim that Reeder having only a leasehold estate could not dedicate, seems to be also based on a misapprehension of the record facts. The right to dedicate was expressly given in Reeder's lease, as shown, and he was thus

constituted a duly authorized agent for that purpose independently of the title acquired by him. His authority is also proved by the acquiescence of the trustees; and by their subsequent deeds to W. C. Huntington with recitals affirmatively recognizing the Dorsey plat, which was *pro tanto* a substitute for the Reeder plat, as will be shown later. The dedication was therefore the dedication of the trustees of the Hughes estate. *Brown v. Manning*, 60 O. St., 298.

It is also claimed that the Reeder dedication was not in accordance with the laws then existing and consequently did not effect a "statutory dedication." For various reasons shown by the testimony here, I am inclined to believe that even if this be true, the facts show an accepted common law dedication which is under all the circumstances equally effective. But a careful consideration of the record will show a complete statutory dedication by Reeder's plat.

This manifestly was the view of Dorsey, who acquired through the Reeder assignment, and of Salmon P. Chase, who, in fact, made and recorded the Dorsey plat; and the views of so eminent a practitioner as Mr. Chase are not to be lightly regarded.

The statute in force when Reeder made and recorded his plat was the act of 1831 (Swan's Statutes [1845], pages 948-9), which provides for the platting of lands in towns and of additions thereto. Counsel in referring to this statute seem to misapprehend its terms and effect; for, while not happily worded, yet, upon careful reading, it seems to me to justify the view taken by Reeder, and by Mr. Chase, as is evidenced by their proceedings under it, in platting the lands in question as an "addition" to the town of Cincinnati (see Sections 7, 9 and 10 of the act, and also act of 1841 providing for vacations).

Reeder's plat, and his proceedings in reference to it, seem to have complied in all essential respects with the requirements of the statute and constituted a good statutory dedication.

The Dorsey plat, made by him as holder of title through McCleany and Bissell—to whom Reeder assigned—is for

the most part a recognition of Reeder's plat and is a complete affirmation of the Sycamore street dedication and Reeder's reservation of the two feet along the eastern boundary—the principal change being in the cross-streets leading eastwardly into Sycamore.

This plat is also executed with manifest care and reference to the statute, and is by endorsement thereon, accepted and ratified by Reeder under the terms of the reserved right of alteration endorsed on his own plat, and, so far as the changes made require, is adopted as a substitute.

But the changes thus made do not in any way affect or change Sycamore street; and the entire effect is therefore to recognize and affirm the dedication of said street.

It is objected that this land being at that time beyond the corporate limits, the city could not take the dedicated title. But this objection seems more specious than real. There is no question of the capacity of a municipality to hold property beyond its own limits for public purposes, as is now, and has been, the case beyond memory as to many public institutions; and it has long been the law that even in case of a common law dedication prior to the existence of a municipal corporation, when the corporation becomes organized and includes the land within its limits, the use of the land at once vests. *Cincinnati v. White*, 6 Pet., 431.

But it is not essential that the right of use should be vested in a corporate body. The public, it has been said, is an ever-existing grantee capable of taking dedications for public use, and its interests are a sufficient consideration to support them. (*Id.*).

The law of 1831 refers in terms to "additions" to a town, in such connections as clearly imply that such dedications are included in its provisions relating to subdivision, of land within its corporate borders. There would be no propriety in vesting the public use of the proposed extension of a city street, in the county commissioners, as counsel suggest, nor does the law so intend, as I construe it.

In view of the facts which to my mind clearly show a statutory dedication, it is perhaps unnecessary to go further

in this direction; and yet the proofs are such as to establish a common law dedication, if for any reason a statutory dedication is not maintainable.

It has been repeatedly held that the statutes prescribing rules for formal dedication do not abrogate the ancient common law rule in this regard. A common law dedication established by proof is just as effective to secure the rights of the public; but for the latter two things are to be proved, namely; a clear intention to dedicate, and an acceptance by the public.

Certainly, in the present case, the unbroken and reaffirmed intent of holders of the property from Hughes, in 1828, to Huntington, in 1875—a period of nearly fifty years—to dedicate Sycamore street is clearly shown by the record evidence.

As was said by the Supreme Court in *LeClerc v. Gallipolis*, 7 O. (pt. 1), 220a: "Anything which fully demonstrates the intention of the donor, or the acceptance by the public, works the effect"; and twenty years later (1855) the general term of this court, in *Gest v. Kenner* (*supra*)—affirmed by the Supreme Court in 7 O. St., 75—held that:

"No particular form of words is necessary to establish it, nor is lapse of time always essential; the acts of the owner of the land as well as of the public, though occurring in a comparatively brief period, are sufficient to prove a dedication."

So far as Reeder and his predecessors are concerned, it is clear that his assignment to McCleany and Bissell on the basis of his plat, and the subsequent affirmance by his assignees and the other purchasers in connection with the Dorsey plat, completed in a legal sense the common law dedication, and made the act irrevocable, not only as to Reeder and his assignees, but also to the successors in title to Hughes, whose agent Reeder was.

It is well settled that the acceptance by the public may be proved by parol; also, that it may be shown by any acts "appropriate to the conditions, such as would naturally flow from the character of the place and settlement of the community." *Winslow v. Cincinnati*, 6 N. P., 47

The testimony shows that until sometime after the acquisition of the lands by Huntington, the entire tract north of what is now Saunders street, lay in rear of the tier of large residence lots fronting eastwardly on Auburn street, which was the main thoroughfare from the city extending up "Sycamore hill" and through Mount Auburn to an intersection with the Vine Street hill road or "Carthage pike."

The lands thus situated were practically a rough hill lying at the head of an extensive ravine extending southwardly toward the city, but the character of the platting clearly shows that the early owners looked forward to a time when the territory would be required for the city uses; and, since Auburn street was a practical continuation in the line of Broadway northward, they projected similar extensions of Sycamore street, and of Main street northward, parallel with Auburn, and in practical conformity with the prevailing plan of city streets and squares. It is manifest upon a glance at the territory concerned that in accordance with the general practice established in the laying out of Cincinnati, and the subsequent experience with said plan, that the location of Sycamore street extension was dictated by a recognition of the future necessity for such thoroughfare, and it is not creditable to the foresight or sagacity of the owners of the lots to the eastward that they did not join in a like dedication of their half of said street as seems to have been anticipated by Reeder. To the situation, then, as it existed from 1838 down to about 1875, or later, the language of Circuit Judge Field (later of the Supreme Court) applies:

"No formal acceptance is essential. * * * The dedication is irrevocable when third parties have been induced to act upon it and part with value in consideration of it. Nor is the irrevocable character of the dedication affected because the property is not at once subjected to the uses designed. In many instances, perhaps the greater number, there may be no present use of the land for the purposes designed, as in the case of streets and parks laid out upon a tract added to an existing city to meet its future growth. * * * In such cases it is understood that the property will

only be subjected to the uses intended as it may be from time to time needed, to meet the growth of the place. If immediate subjection were required in such cases the object of the dedication would be defeated." (Citing *Rowan's Ex. v. Portland*, 8 B. Mon., 232); *Grogan v. Hayward*, 4 Fed., 161.

To the same effect is the holding of the United States Circuit Court of Appeals in *Bank v. City of Oakland*, 90 Fed., 691.

The case of *The Town of Derby v. Alling et al.*, 40 Conn., 410, is also forcibly applicable to the facts of the present case.

"As the grantors," says the court, "could not have contemplated an immediate opening of all the streets, but the opening of them from time to time as they should be required by the growth of the village, an actual acceptance by the public of such streets or parts of streets as were not then opened, was not necessary.

"The grantors made an irrevocable dedication of the entire street as laid down on the map, and the acceptance by the public of the parts that were opened, was a constructive acceptance of the whole. Until the time when, under all the circumstances, the public authorities were called upon to extend Third street, no laches were chargeable to any one and the possession of the respondents did not begin to be adverse to the public right." And substantially to the same effect is *Fulton v. Mehrensfield*, 8 Ohio State, 440.

It was not until 1875, or later, that the Huntingtons began to grade off the ground and actually open up the property to access and settlement. Mason street was extended through to Auburn avenue; Auburn place was extended to Lewis (Sycamore street), and the latter, for the space of nearly 100 feet, made use of to connect Auburn place with Estelle. It appears that in the construction, or at the permanent surfacing of Mason street by the city, curbs were turned in and Lewis street constructed a few feet up to the south line of Mason to indicate the debouche of Sycamore street or Lewis street upon Mason, and that

in constructing the 100 feet or thereabouts of Lewis street to connect Auburn place with Estelle, the curbs of Lewis street were turned south at Estelle to indicate the future extension of Lewis street south from Estelle to Saunders.

Just when these constructions were made does not appear; but testimony of the residents in the neighborhood places them at least as early as 1882 and probably the date is much earlier.

But the non-opening of Sycamore street as a whole with the other streets of the plat would seem, from all the circumstances, to be mainly due to the fact that what was dedicated was only half of the ultimate street, and, until the owners of lands east of it contributed their part, the time for its opening had not, and has not yet fully arrived. Nevertheless, lots had been sold in the subdivision, the strip had been treated as public property by non-taxation, and in minor ways the city authorities and adjoining owners, so far as occasion arose, recognized it as a street.

But the plaintiff claims that the reservation endorsed by W. C. Huntington on his plat of 1875 operated to revoke the dedication of Reeder. If the views hereinbefore indicated are correct, it is obvious that Huntington was without power to revoke.

In *Huber v. Gazlay*, 18 O. St., 18, where a similar question arose, it was held that where a common law dedication had become effective by sale of lots, no power remained in the grantor and his attempt to "reserve" in a subsequent plat was nugatory.

But the case here was even stronger. W. C. Huntington's title came from the leasehold granted to Reeder through the Saunders' heirs by deed in 1867, calling for lots "D, E, F, G, H and I, on the blue plat of the Dorsey subdivision by S. P. Chase, trustee, * * * subject to the covenants and conditions of a certain other lease made by the trustees of Thomas Hughes, deceased, to Eden B. Reeder," etc. In 1875 said Huntington acquired from the then trustees of Thomas Hughes a release and quit-claim to a tract bounded on the west by Locust street, north by Mason street, south by Saunders street—all being streets

designated by the name given upon his own plat (of 1875) and on the east by lands of Holden, Thoms, Smith and Huntington.

Then follows, as part of the description, these words: "Said lot being known as D, E, F, G, H and I, of the Dorsey blue plat, book ———, Hamilton County Auditor's office."

A release and quit-claim under the common law, was inoperative except the grantee held a prior estate in possession; but in Ohio it is regarded as a conveyance of title generally, *according to its terms*. (*Hall v. Ashby*, 9 O., 96).

In this case, however, the wording of the deed is careful and specific. There is no word of conveyance in it—such, for example, as "bargain," "sell," "grant," or "convey," which courts have sometimes seized upon to give it effect as an independent conveyance of title. The sole words here are "release" and "quit-claim"—which are not to all intents synonymous. Moreover, the grantors, notwithstanding the description of the land by boundaries, which must have been the suggestion of the grantee, are careful to follow it up by a declaration that it is in fact certain lots upon the Dorsey plat only that are conveyed, and they convey only their title and interest and covenant only against their own acts.

It conveyed, in a word, the residual title of the grantors to that, and that only, which was already held by the grantee under his perpetual leasehold. It did not and could not operate to enlarge his territorial holding. Huntington held, under his deed of 1867, specific lots of a subdivision bounded on and subject to public rights in certain portions set apart as public streets shown on a plat which was a public record. As the successor in title to the dedicators he was bound by their acts (*Gest v. Kenner*, and *Huber v. Gaslay*, *supra*).

The careful wording, no less than the form of the deed of the trustees, show that they were acting advisedly and in recognition of the fact that they had no title to and could not convey the right which their predecessors had already dedicated to the public.

It follows, therefore, that the reservation endorsed on the Huntington plat was nugatory, since he acquired no title to Sycamore street.

It appears that at the date of his plat (1875), he owned on both sides of Sycamore street from Estelle street southward to Mount; and perhaps intended the so-called reservation to be a notice merely of his intention to institute vacation proceedings under the statute; but, immediately after filing his plat, to-wit, in 1875, he sold lot 81 and in 1877 sold lot 82, these lots extending at the west side of Lewis street from Saunders to Auburn place, beyond Estelle; and later sold the property to the east of Lewis between Estelle and Saunders. The house now owned by the plaintiff was built, as shown, on lot 81, in about 1883, upon the line of Sycamore street with manifest reference to it as a public street; and Mr. Frank Huntington, who owned at both sides of Sycamore, testifies that he always understood that Sycamore street was a dedicated street, and knew nothing of any reservation. Other neighborhood owners testify to the same general understanding.

As already shown, the plat of 1875, filed by W. C. Huntington, shows Sycamore (Lewis) street in full lines as an open street from Mason to Saunders exactly as in the Dorsey and Reeder plats, showing also the two-foot reservation to the east.

Although this plat shows Sycamore street discontinued from Saunders street south, it is clear that Huntington did not rely upon his reservation, as is shown by the fact that he subsequently took proceedings under the statute to vacate Sycamore street from Saunders south. It is possible, as suggested in argument, that he intended to reserve only from Saunders south and that the reference to Estelle is a mistake. This seems probable, because the plat and reservation are wholly at variance, but for reasons given I think the reservation was wholly nugatory for any purpose.

There is more in the testimony that tends to strengthen the views hereinbefore expressed, but the reasons given seem to me conclusive in showing that the title to the strip in controversy is vested in the city and for the benefit of

the public for street purposes. I find also that the quit-claim deed of W. C. Huntington to the plaintiff, so far as it purports to convey the twenty-three feet actually platted as Lewis street, is void as to such portion, but that said deed is good, as to the remaining two feet, to vest the title in trust in the plaintiff, until such time as the owners may dedicate as contemplated by the Reeder and Dorsey dedications.

Judgment for defendant, with costs, dismissing the petition.

O'Hara & Jordan and C. P. Brown, for plaintiff.

C. J. Hunt, City Solicitor, contra.

HENRY W. ROETTCHER v. EARLE R. PASSEL, ADMINISTRATOR, ETC.

1. To charge a landlord for injuries to the public resulting from a nuisance on leased premises, the nuisance must necessarily result from the ordinary use of the premises by the tenant. Where injuries result wholly from improper or negligent use of the leased premises by the tenant, he alone is chargeable.
2. Where premises are leased in parts to various tenants and the nuisance is in respect of parts—such as hallways, etc.—reserved for the common use of tenants and the public, the landlord is responsible both to tenants and the public for injuries due to defective construction and maintenance.
3. A coal hoal or chute in a sidewalk adjacent to premises leased to various tenants and used in common by some or all, is to be maintained in proper condition by the owner; and he will be liable for injuries flowing from negligence in respect of such maintenance—more especially if the injurious results are due to defects in construction, such as a failure to provide proper safeguards, or such as render possible a dangerous displacement that would not be readily observable by those using the sidewalk.
4. In view of common knowledge and advance in the mechanical arts, there is no excuse for slip-shod construction in such

matters, considering the danger to life or limb likely to result from carelessness in this regard, and it is the primary duty of public officers having jurisdiction over these matters to see that public safety is at all times conserved.

HOSEA, J.; FERRIS and MURPHY, JJ., concur.

The action below was by the administrator of the deceased against the owner of the premises, for death through negligence in maintaining a "coal-hole" in a sidewalk. The petition alleges ownership and occupancy and avers the duty of defendant below, as the owner, to keep said opening safe and secure to prevent injury to those using the sidewalk. The negligence alleged is that defendant below permitted said opening "to remain insecure and unsafe" without guard or warning to pedestrians, and that the decedent while lawfully passing on said sidewalk stepped upon the iron grating covering said opening, and, the same not being secure, turned and slipped from its place and precipitated the decedent into said opening, causing injuries from which death ensued.

The defendant below takes issue by answer only upon the alleged insecurity of the opening, the injuries to decedent, and his own occupancy or control of the premises; and for a second defense avers negligence of decedent as the cause of any injuries suffered.

The reply of plaintiff below formally accepts the issues thus tendered.

The cause being tried to a jury resulted in a verdict and judgment for plaintiff below—defendant in error here—and the present proceeding is brought to reverse the judgment and for a new trial.

Various errors are complained of—some relating to the admission of evidence and others going to the views of the trial court as to the law governing the case, as exemplified in the charges, special and general; but they depend chiefly upon the question of the legal liability of the landlord, who, as shown by the testimony, did not reside upon or physically occupy the premises.

In reviewing the action of the trial court, it is apparent that the court was called upon, under the issues presented both in pleading and testimony, to determine, as matter of law, whether the landlord could, under the proofs, be held at all, since this was a condition precedent to the submission of the question of negligence to the jury. To this fundamental question, therefore, we first direct our attention.

The conditions under which an owner of abutting premises is liable for injuries of the nature here in controversy, are partially defined in *Schindelbeck v. Moon*, 32 O. S., 264, and *Langabaugh v. Anderson*, 68 O. St., 131. In the latter case the court cites a summing up of the conditions fixing the liability of the landlord, from *Wood on Landlord and Tenant* (Sec. 536), as follows:

"The rule may be stated as a result of the authorities to be that, in order to charge the landlord, the nuisance must *necessarily* result from the ordinary use of the premises by the tenant, or for the purposes for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or may not become a nuisance, according as the tenant exercises reasonable care, or uses the premises negligently, the tenant alone is chargeable for the damages arising therefrom."

This general statement of a general rule must be understood, as will appear from the authorities, as applying to an entire surrender of possession and control of the property. (Sherman and Redfield, 708.)

In the case at bar the undisputed proof shows a piecemeal renting to various tenants; that is to say, the third floor to one family, the second floor to a second, the back rooms on the first floor to a third (with halls and stairways in common), and the store room in front to defendant's son. The coal hole in question was one of two, both opening into a common cellar—two of the tenants having the use of one and two of the other. The son collected the rents in the absence of defendant and testified that he "had occasion

for five years to look after things on account of family interest"; but that there was "no occasion for repairs." The third floor tenant (a witness for defendant), testified that by request of defendant, Roettcher, he had agreed to look after the coal chute in question and keep it closed and in repair. "Of course," he says, "repairs on the outside—I don't suppose he expected any one to do that" (evidently meaning that it was not expected of the tenants). "This arrangement," he says, "was made when I rented. He asked me to watch it and see that it was closed, as he could not be there all the time, and I agreed."

It is clear from this testimony that the defendant did not surrender the entire possession, but only parts of his premises. It is not stated whether the building covers the entire lot, but the tenants rent and occupy only certain rooms, with privilege of using for convenience of access, etc., other parts in common. The case does not, as we think, fall within the Ohio rule above cited, because there is no complete surrender of possession—there is a mere rental of lodgings, with control and responsibility remaining with the owner to take care of demised parts.

The courts have treated the responsibility for maintaining a safe pavement structure, such as a coal chute, as in the nature of a covenant running with the land; and so long, therefore, as a shred of possession remains in the landlord, the initial duty of safe maintenance arising out of a structure in derogation of the public right in the adjacent highway remains incumbent upon him. *Trustees v. Foster*, 156 N. Y., 354.

The governing rule, briefly stated, is that where portions only of a building are let, the owner continues responsible for the condition of the remainder, both as to tenants and the public. *Sh. & Redfield on Neg.*, par. 710; *Redman v. Conway*, 126 Mass., 374; *Gordon v. Cummings*, 152 Mass., 513; *Marwedell v. Cook*, 154 Mass., 735; *Miller v. Hancock*, 2 Q. B. D., 177; *Hilsenbeck v. Guhong*, 131 N. Y., 674; *Sawyer v. McGillionddy*, 81 Me., 318; *Canandaigua v. Foster*, 156 N. Y., 354.

The discussion of the question in *Miller v. Hancock*, (1893), *supra*, by Esher, M. R., and Bowen, L. J., is particularly clear in demonstrating that the common use of hallways, etc., by tenants for access or convenience is not a letting, but a mere easement which implies no giving up of possession by the landlord. *Canandaigua v. Foster* (1898), *supra*, is also an instructive deliverance, by the New York Court of Appeals, upon the same subject. The opinion declares, in part, that:

"The implied duty assumed where the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public so long as he remains the owner and is in possession of any part of the building on the abutting land. * * * Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, so long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as part of the sidewalk. * * * A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relations existing between the owner and one of his tenants with reference to the control of the grate, but a simple rule, resting upon ownership and possession in whole or in part, of the adjacent structure, is required by a sound public policy."

We can not doubt the correctness of the principle thus decided. Were it not so, a landlord would have it in his power to fritter away by unlimited subdivision that responsibility which as matter of sound public policy should exist somewhere in definite tangible form for the benefit of those unfortunate enough to be made the victims of the parsimony or carelessness of those for whose benefit the structure is maintained. In the case at bar, moreover, the defendant recognized his continuing responsibility for the care of the chute in question by appointing one of the tenants his agent to look after it and see that it was kept closed "because he could not be there all the time."

There being no conflict in the testimony on this point, there can be no question as matter of law upon the evidence, that the defendant, as the owner of the property, was the proper party to sue. The trial court took this view and gave to the jury in its charges the following, which are the subject of strenuous objection:

In special charge No. 4, the jury are instructed that:

"In the case before you the defendant, Henry Roettcher, is the person upon whom devolved the duty of exercising ordinary care in seeing that the coal hole or scuttle with its lid was kept reasonably safe as any other part of the street."

Again in the general charge it is said:

"It was denied that defendant had control of said cellar, *but under the evidence as it was adduced, in law the defendant was in control of said coal cellar and covering*, and had the duty of caring for and keeping said covering and coal chute in reasonably safe repair and condition."

We think the trial court was entirely correct in the view of the law set forth in these instructions. The allegation of the petition as to ownership and occupancy is fully supported by the answer admitting ownership and by the proofs showing a constructive occupancy or right of entry to undemised portions of the building, as to which tenants had a mere easement or privilege of use for access and convenience collateral to their tenancy.

This being correctly charged, it was manifestly not erroneous for the court to refuse defendant's special charge No. 1, which would have left it to the jury to determine from the evidence whether defendant had transferred the entire possession and control of the premises to his tenants with the coal chute as an appurtenant.

But the further testimony in the case presented another important feature also bearing on the liability of the defendant, directly under the Ohio authorities cited. It shows by plaintiff that the decedent was walking along the

pavement in the ordinary way, with his wife; and that there was nothing visible about the coal chute to indicate that it was open or to warn any one of danger and that "the cover was not misplaced in any way, but was secure in its position where it belonged"; and that those conditions being as thus described the decedent unsuspectingly stepped upon the lid to pass onward. The lid, on being thus stepped upon, tilted and precipitated decedent into the hole astraddle of the lid and upon its upturned edge, and inflicted injuries that proved fatal two days later after much suffering.

There was no denial or counter evidence as to these facts of actual observation. Defendant attempted to show by opinion evidence that the lid, if properly seated, could not tilt under such circumstances; but this was of little significance as opposed to observed facts, and was practically destroyed by other conditions referred to later.

It was further shown, by both sides, that the lid in this case had no chain or other means of fastening nor provision of any kind for the attachment of any; and defendant proved, further, that this was an inherent condition of the original construction and never remedied. Defendant also showed that the cover was a perforated cast-iron disc about eighteen inches in diameter, about seven-eighths of an inch thick, resting, when in proper position, upon an inner concentric ledge from one-quarter to one-half inch wide, within the circular open cylinder or casing embedded in the pavement. The witnesses to these facts testified that any one could at any time lift or displace the cover by the perforations; and also, that if the cover were prevented from fully seating at one side by a pebble or piece of coal, so as to remain in a slightly inclined position, it would be apt to tilt when stepped on.

These facts are of vital significance. Taking the last suggestion, for instance, it will be manifest from the nature, sizes and proportions of the parts described, that a cover slightly beveled (as would naturally be the case in casting) would, if slightly raised at one side, not rest upon the supporting ledge at the opposite side. In this condition it would still be within the cincture of the casing and yet

be without support at one side, while to all appearances to one walking on the pavement, the cover would be, as described by the testimony in this case, "not misplaced in any way, but secure in its position where it belonged." If stepped upon, the unsupported arc of the cover would at once go down, and the cover, pivoting at the opposite ends of the transverse diameter upon the concentric ledge of the casing, tilt to a vertical position. In fact, this condition could very easily and very naturally be brought about without the intervention of any foreign agency (such as a pebble or piece of coal), by simple neglect to use special care in seating the cover after use. The addition to the structure of a chain or other simple fastening, would have furnished a means of absolute prevention of danger; and the testimony here shows that such means of safety are quite commonly used.

Courts of high authority have condemned such structures without fastenings, and held them to be unsafe as matter of law.

Thus in *Jennings v. Van Shaik*, 108 N. Y., 534, it is said:

"If the cover was so made that it could be opened by any one from the outside maliciously or accidentally the construction was faulty."

In *Stevenson v. Joy*, 152 Mass., 45 (47), it was held that the landlord was chargeable with notice of a cover being unfastened because, having provided no means of fastening, he ought to have known it.

So in *Dickson v. Hollister*, 123 Pa. St., 421, the following charge of the lower court was approved:

"Parties who make holes in the pavement are bound to know that if the covers are not kept solidly in place somebody may fall through, and are therefore bound to exercise all reasonable care, skill and prudence with reference to the possible injury that may occur to persons passing along the street. Of course, they are not insurers, but they are bound to exercise such degree of mechanical skill

in arranging the openings as would be ordinarily proper and necessary to protect travelers in view of what might occur."

(See also *Johnson v. McMillan*, 69 Mich., 36.)

The closing words of the last citation seem to be particularly applicable to the case in hand, for the testimony shows clearly a structure essentially deficient in features conducive to safety. These defects are inherent in the structure and are not due alone to the mere absence of a recognized adjunct. The structure, taken as a whole, shows a culpable disregard of what is "ordinarily proper and necessary to protect travelers in view of what might occur." It, in other words, falls distinctly below the common and ordinary standard of mechanical knowledge, of which a court may properly take judicial knowledge. For more than a century, disc valves employed for various purposes, seating upon a concentric ledge within a casting in all essential respects similarly to the coal chute cover in this case, have been provided with depending wings or guides to compel proper seating. Cistern covers, thus constructed, of which examples exist in our public streets and in private use, and, indeed, many coal chute covers in common use, embody these and other means of safety equally simple and well known. In view of this common knowledge, there is absolutely no excuse for such slipshod construction as appears in this case; and, in view of the danger to life resulting from the neglect of proper precautions in this regard such carelessness can not be too strongly condemned. It is an affront to intelligence at this day, to say that a construction is or can be safe for public travel, which, having the appearance of safety and inviting reliance upon its integrity, proves a source of injury, or, as in this case, a death trap, to the unsuspecting citizen. It is the primary duty of municipal officers having jurisdiction of these matters to see that the public safety is at all times properly conserved; and the fact that lower standards of safety, based upon conditions prevailing when coal chutes in public pavements were few in number, have been long in use, is no excuse for adhering

to them at this day, when these structures have vastly multiplied and better standards are demanded by the changed conditions of modern life.

Considering the full bearing of the testimony in this case, a trial court might well be justified in applying the rule of *res ipsa loquitur*, and have left to the jury only the assessment of damages. The defendant had no cause of complaint when the court charged the jury only upon a rebuttable presumption of negligence, and left them to say whether upon the entire evidence the defendant was chargeable.

It will be unnecessary to follow the specifications of error in further detail. The action of the court in giving and refusing special charges, and in the general charge, all hinged upon the views of the law herein indicated, and we find in the record no error prejudicial to defendant. We are of opinion that the verdict for plaintiff was a necessary result of the testimony. A contrary verdict could not have been sustained.

Judgment affirmed.

Clore, Dickerson & Clayton, for plaintiff in error.

W. W. Symmes, for defendant in error.

D. H. BALDWIN & CO. V. NANNIE PELTON AND JOHN H. GIBSON, TREAS., ETC.

Lien of the state for taxes under the Dow law takes precedence of other liens, even a purchase-money mortgage. Possession of property is conclusive evidence of ownership under tax laws. The fact that the business in which the property is used is unlawful does not affect the right of the state to collect the tax by sale.

HOSEA, J.

Petition was filed September 17, 1903, in foreclosure of a chattel mortgage dated March 19, 1901, to secure balance

of purchase money due upon a piano; and recites the fact of seizure by John H. Gibson, treasurer of Hamilton County, and threat of sale. The court is asked to take possession by a receiver, to marshal liens, etc. On the same day, the sheriff was appointed receiver.

Gibson, treasurer, by way of cross-petition, sets up due proceedings under the Dow law (R. S. 4364-9 *et seq.*), whereby the property was levied upon and seized by the treasurer for the non-payment of the tax therein provided for, assessed against the principal defendant, Pelton, for one year from the fourth Monday in May, 1903, and claiming that such levy takes precedence of all other liens.

It is also alleged that the principal defendant, Pelton, kept the premises as an improper house in connection with the sale of liquor.

The treasurer asks for a sale and satisfaction of his lien of \$436.80.

Upon the hearing it was shown that the piano was sold by the plaintiff and a chattel mortgage duly taken upon deferred payments, and was valid as to a balance of about \$40 remaining unpaid at the date of levy; that the defendant, Nannie Pelton, kept an improper house, and sold liquors; and that the piano was part of the furniture of the establishment, all of which was duly levied upon for the Dow tax and penalties.

The question raised and argued in the case, is whether the lien of the state for the tax under the Dow law can take precedence of the lien of purchase-money mortgage.

The statute in question contains the following provisions:

4364-9. "Upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquor there shall be assessed yearly and shall be paid into the county treasury as hereinafter provided, by every person, corporation or co-partnership engaged therein, and for each place where such business is carried on by and for such person, corporation or co-partnership, the sum of three hundred and fifty dollars."

4364-10. Provides for the lien of the assessment on real property, and the time and manner of payment.

4364-11. Provides for apportioning the assessment to the portion of the assessment year covered, and for refunder in proper cases in accordance therewith.

4364-12. Provides for the collection by the county treasurer in case of a refusal to pay, by distress, and sale, as upon execution, of the goods and chattels of such person, corporation, or co-partnership—

“And, in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation, or co-partnership, wherever found in such county, *or on the bar fixtures or furniture, liquors, leasehold and other goods and chattels, used in carrying on such business, which levy shall take precedence of any and all liens, mortgages, conveyances, or incumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; nor shall any claim of property by any third person to such goods and chattels, so used in carrying on such business, avail against such levy so made by the treasurer,*” etc.

The language of the statute is explicit, and leaves little room for discussion of its meaning. The question of the case under this statute is not, broadly, whether the property of A can be taken to satisfy a tax assessed against B, but whether property of A used by B in carrying on a certain business can be seized to satisfy a tax assessed against B in respect to such business.

The distinction is incidentally touched upon in the case of *R. R. Co. v. Roach*, 80 N. Y., 339, which arose upon a tax law providing that goods and chattels in possession of or upon the lands of a person against whom a tax is assessed shall be deemed to belong to him, “*and no claim of property made thereto by any other person shall be available to prevent a sale.*”

Here the court points out that while the purpose of the statute is to facilitate the collection of taxes and prevent embarrassment to the government through fraud and col-

lusion of parties, yet it must be construed reasonably, and did not apply to property of another incidentally and temporarily upon the land of the tax debtor "and in possession of the owner for his own purposes."

The taxing power of the state being vested in the General Assembly, the judiciary is not concerned in the question of the propriety of the law except it be shown that the mode of exercise of the power transcends the limits fixed by the constitution. *I Cooley on Taxation, p. 47.*

I do not understand the constitutional question is raised by the defendant here, but it has been settled in favor of the law in *Adler v. Whitbeck*, 44 O. St., 539, and also in *Anderson v. Brewster*, 44 O. St., 576, which have been further approved in 68 O. St., 644, *State, ex rel, v. Auditor of Montgomery County.*

Indeed, the constitutional validity of laws of this character making the possession of property conclusive evidence of ownership under tax laws seems to be well established in cases analogous to the present. From an examination of some of these cases it would seem that the Dow law had been framed in view of the principles there enunciated.

Thus, in *Morrow v. Dows*, 28 N. J. Eq., 459, the third syllabus is:

"The Legislature has power to make taxes a lien paramount to all rights which the citizen may acquire in lands; and mortgages, or liens taken after the enactment of such law, would be postponed to the payment of the public revenues."

The court in the opinion calls attention to the fact that liens are purely statutory in their origin and says that—

"It is an essential attribute of government that power should inhere in the Legislature to make the taxes (without which it can not be maintained and supported), liens on property paramount to all rights that may be acquired by the citizen. The right to establish the preference necessarily results from the right to tax by uniform laws of taxation, all such property as may be requisite to the execution of

its functions. Mortgages or liens, taken by the individual, after the enactment of such laws, would unquestionably be subject to be postponed to the payment of the public revenues."

Similar views and rulings appear in *Dale v. McEvers*, 2 Cow., 118; *Parker v. Baxter*, 2 Gray, 185.

In *Hersee v. Porter*, 100 N. Y., 403, the general question is elaborately reviewed and discussed upon a tax statute providing for distress of goods and chattels in possession, and a clause that "no claim of property to be made thereto by another person shall be available to prevent a sale." In the case cited, as in the case at bar, the mortgagee permitted the mortgagor to retain possession after default.

After discussing the constitutional question and showing that the provision was not a new remedy, the court continues:

"Each individual in the community has notice of the law and is presumed to understand that if his chattels are by his consent or permission in possession of another, they can be taken for a tax against the person in possession. The law was probably framed to prevent fraud or collusion, and disputes as to title, and each individual in the community may be presumed to have consented that his property shall be subject to the right of the state in this way to enforce the power of taxation, as between the owner of the property seized and the person taxed, the latter ought to have paid the tax, and we see no reason to doubt that if the payment is enforced out of another's property in his possession, the true owner has a remedy against the one who ought to have paid it.

"The proceeding * * * was an execution of the power of government in respect to taxation, and, although the right to take the plaintiff's property for the tax was not adjudged in a legal proceeding, the act of the Legislature and the administrative acts under it, is, we think, due process of law within the meaning of the constitution."

See, also, *Sheldon v. Van Buskirk*, 2 N. Y., 473; *R. R. Co. v. Roach*, 80 N. Y., 339; *Sears v. Cattrell*, 5 Mich., 251; *Dunlap v. Gallatin*, 15 Ills., 7.

It is claimed in defense that the provisions of the statute cutting out mortgages and other liens should not be held to apply to a vendor's lien, because (1) the lien of the vendor is the highest and best known for the law, and (2) as the sale of liquor in a house of this character is unlawful, the seller can not be held to have contemplated such use of the mortgaged property at the date of sale.

As to the first proposition, it is sufficient to say that the statute makes no distinction between a vendor's mortgage and any other. "The statute does not inquire"—as was said in *Hershee v. Porter*, *supra*—"whether the legal title is in A or B, but conclusively adjudges it to be in the person taxed for the purpose of seizure and sale, provided it is in his possession. For the purpose of collectig the tax the actual ownership, in contemplation of the statute, follows the possession. The possession under the statute is not merely a badge of ownership, it is title, so as to subject the property to seizure and sale for a tax against the possessor."

The intention of the owner of the property, therefore, can make no difference in the application of the law. And a little reflection upon the endless possibilities of defeat to the state in the collection of such taxes under the rule contended for here will satisfy the mind that any other construction of the law would practically defeat its operation. It is not, therefore, to be regarded as an unnecessarily harsh rule, but one absolutely necessary to secure the rights of the state, and therefore demanded by the public interest.

The owner, as one of the general public, has conferred upon the Legislature the power in question, and is interested in upholding it in behalf of the state in a higher degree than in defeating it in respect of his private interest as an individual. *McCullough v. Maryland*, 4 Wheat., 428.

The fact that the business is an unlawful one does not affect the right of the state to collect the tax. As was pointed out by Beldon, J., in *DeMonte v. Pabst*, 49 Ohio Law Bul-

letin, 97 (citing the language of Judge Pugsley in *Stevenson v. Hunter*, 2 N. P., 300):

"It would be an anomaly to hold that a violation of the law relieves one of the payment of the tax. The result would be that those who are lawfully engaged in carrying on the business must pay the tax, while those who carry on the business in violation of the law are exempt. This would be putting on a premium on disobedience to the law."

And the same point was decided, upon unlawfulness created by a municipal ordinance, in 65 O. S., 49, *Conwell v. Sears, Treasurer*, in which case Judge Shauck remarks that at the time the Dow law was passed, and for a half century before, there was a statute forbidding throughout the state the sale of intoxicating liquors to be drank on the premises where sold; and that the growth of the business, notwithstanding the interdiction of the traffic, showed that, although unlawful, it continued to exist; and therefore the Dow law must be taken to apply to the facts as they existed, and that it was purposely drawn "in terms that admit of no exception."

The action of the treasurer is sustained, and upon sale of the property distribution will be made in accordance with these holdings.

Drausin Wulsin, for plaintiff.

Ampt, Ireton, Collins & Schoenle, County Solicitors, for defendant.

THE LOUISVILLE COAL & COKE COMPANY V. THE POCAHONTAS COMPANY; AND THE GREENBRIER COAL & COKE COMPANY V. THE POCAHONTAS COMPANY.

1. A partnership selling the product of a coal company under a contract designating the partnership as "selling agents," where the ultimate selling price is fixed by the company and the compensation for selling is a "commission" by way of a percentage on sales, the fact that the partnership guarantees the sales, insures and pays other expenses incidental to selling, does not place them in the relation of purchasers but of factors under a *del credere* commission as agents.
2. Property of a non-resident, held in this state by a *del credere* factor, may be attached as the property of the non-resident, subject to the factor's lien for commissions, advances, etc.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

By the act of 52 O. L., 34, this court is given jurisdiction of actions brought against a non-resident of this state or a foreign corporation where property of or debts owing to the defendant may be found in the city of Cincinnati.

These suits are brought against a foreign corporation, and the primary question involved in these motions arises upon the validity and effect of a garnishment served upon a partnership composed of non-resident partners doing business within the jurisdiction of the court, in suits for money.

It may be premised as a cardinal principle that the jurisdiction of the court in a suit against a non-resident depends upon and is limited in extent to property taken into custody upon attachment proceedings duly had. The suits therefore become, essentially, proceedings *in rem* (*Buckeye Pipe Line Co. v. Fee*, 62 O. S., 545 [556]; *Oilwell Supply Co. v. Koen*, 64 O. S., 422 [429]), and the fact that such property, subject to garnishment, exists in the hands of the garnishee, must be found by the court before the suit in attachment can proceed to final judgment. *Myer v. Smith et al*, 29 O. S., 120.

It is a settled principle also that in proceedings depending not upon natural right, but upon statutory authority solely, the conditions imposed by the statute as the basis of remedial action must be complied with. Attachment laws are there-

fore strictly construed as against the party seeking their enforcement. *Cook v. Olds Gasoline Works*, 19 C. C., 732; *Endel v. Leibrock*, 33 O. S., 254.

In the case at bar the summons issued January 8, 1903, is returned "not found," and an order of attachment January 8, 1905, is returned, endorsed: "1903, January 8. No goods or chattels, lands or tenements found to attach, and I have this day served Castner, Curran & Bullitt with a true copy of this writ and notice to garnishee by leaving the same at the usual place of business of said partnership and with H. R. Mather, manager of said firm, personally, at 11:55 o'clock, and have summoned them to appear and answer as required by law."

The statutory basis for service upon garnishee is an affidavit describing the property coupled with the inability of the officer to get possession of the same. (Section 5530.) If the garnishee be a partnership, service may be made by leaving a copy of the order and notice to the garnishee to appear in court and answer, at the usual place of doing business, etc. (Section 5534.) It is further provided that the garnishee shall stand liable to the plaintiff in attachment for all property of the defendant in his hands and money and credits due from him to the defendant from the time he is served with the written notice mentioned in Section 5530 (Section 5538).

Incidentally it has been held that the service holds only such property as is at the time in the hands of the garnishee. *Rice v. Farnham*, 7 N. P., 189.

The question here, then, is a jurisdictional one, namely: Is there property or are there credits lawfully in the custody of the court by virtue of the proceedings had in this case?

So far as concerns the objection that a garnishment proceeding will not lie against the property or credits of a non-resident debtor, as intimated in a dictum in *Root v. Davis*, 51 O. S., 29, it seems to be conclusively answered to the contrary by Judge Saylor in a case decided by him when on the bench of the common pleas. See *Goebel v. Bank*, 3 N. P., 109.

The garnishee has filed no answer, but under the order of the court, H. R. Mather, the local agent of the garnisheed firm, appeared before a referee and admitted the service of garnishee process and claimed ignorance of any relation of indebtedness of the firm represented by him, and that no account with the Pocahontas Company existed on his books; that his custom was to deposit all collections from sales in bank here to the credit of Castner, Curran & Bullitt, Philadelphia, excepting a small amount reserved as an agency fund.

Upon a subsequent examination he could not answer as to amount of coal on hand on January 8, 1904, as his books had all been sent to the head office in Pennsylvania since his first examination, and he refused to request their return. Upon the order of the referee, however, he subsequently testified that he had done so, but the firm declined to send the books or give any information.

In support of the motion to dismiss the attachment, the defendant files affidavits of Tierney, president, and Goodwill, secretary, of the Pocahontas Company; and of Castner, of the garnisheed firm, claiming in substance that the parties are all non-residents of Ohio; that Castner, Carran & Bullitt owe nothing to the Pocahontas Company; that the Pocahontas Company has no property in Ohio; that the Castner, Curran & Bullitt firm was not formed to do business in Ohio, and never had any property of the Pocahontas Company in its possession in Ohio, and has no contract with the Pocahontas Company made or to be performed in Ohio.

Against the motion the plaintiff presents, in addition to the testimony of Mather before the referee, affidavits of Justus Collins, president; Javius Collins, secretary and treasurer, and J. S. Jameson—all of plaintiff company—and H. W. O'Keefe, agent at Bluefield, West Virginia, of the Smokeless Fuel Company, all of whom say that the Pocahontas Company buy the output of the collieries mining Pocahontas coal and employs Castner, Curran & Bullitt as its exclusive selling agent. They detail the method of business by which the agents sell and distribute the coal to purchasers through the various branches of the firm in the

United States and elsewhere; and aver that the firm sells an average of about ten thousand tons per month in and near Cincinnati; and attach schedules showing the exact quantities shipped to Castner, Curran & Bullitt, at Cincinnati, from December 1, 1903, to January 8, 1904. They assert, on the basis of these figures, that Castner, Curran & Bullitt were indebted on January 8, 1904, for coal shipped and not yet paid for, about forty thousand dollars.

By way of rebuttal, affidavits of Tierney and Mather are presented. The former, having read the preceding affidavits, denies that the coal of the Pocahontas Company was sold by Castner, Curran & Bullitt, and declares that it became the property of Castner, Curran & Bullitt when loaded at the mine tipples, and denies that the Pocahontas Company ever shipped any coal to Castner, Curran & Bullitt at Cincinnati or to its customers. He attaches a copy of the contract between the Pocahontas Company and Castner, Curran & Bullitt governing their relations, claiming that it was made and its provisions carried out in West Virginia. He details the operations and procedure under the contract, claiming that Castner, Curran & Bullitt are purchasers of the coal in West Virginia, and that it then and there becomes their property at an agreed price "subject to readjustment" according to the ultimate selling price, and that Castner, Curran & Bullitt "assume all risk and pay all incidental charges," "but the Pocahontas Company holds Castner, Curran & Bullitt immediately responsible for the price of its product agreed upon as aforesaid." He says that settlements are made each month with Castner, Curran & Bullitt of Philadelphia, and that the Pocahontas Company have no dealings with local agents of Castner, Curran & Bullitt.

Mather avers that he keeps no accounts with the Pocahontas Company, and claims that Castner, Curran & Bullitt are sole owners of the coal; that they insure it as their own in their bins and pay taxes on it. He attaches copies of the tax returns made by him as the local agent of Castner, Curran & Bullitt from 1898 to 1904, inclusive, showing an average return of about twelve thousand dollars in value of coal on hand.

It will be manifest from this testimony that the effort of defendants is directed to asserting in various forms that the legal relations of the firm of Castner, Curran & Bullitt to the Pocahontas Company are those of purchaser towards the seller and not those of agency, as originally claimed by Mather. It is true that where the terms of a contract between parties are obscure or uncertain, the practical construction which the parties themselves have put upon it will have great weight with a court in determining its meaning and legal effect; but where the parties have put their contract in writing, resort must be had in the first instance to the writing, as if its terms are clear and there is nothing uncertain as to its meaning, there is no occasion to resort to extraneous aids to its interpretation. This is the more necessary because acts are often equivocal and may be equally consistent with one or the other of the two theories of relationship of parties—and this is true of much of the testimony here.

In the present case, however, the contract itself refers throughout to “agents” and “sales agents”; and while this fact of itself is not conclusive, the context adds to its significance, as will appear from the following extracts, in which we italicize certain words and phrases:

(1) The party of the first part agrees to constitute and appoint the parties of the second part its *sole agents* during each and every year of the life of this agreement *to sell coal for the party of the first part. The prices and terms of sale shall be determined from time to time by the party of the first part*, etc.

(2) The party of the first part agrees to pay to the parties of the second part and the parties of the second part agree to accept *as their commission on sales of coal made by them as such agents* the following amounts (percentages of net selling price f. o. b. Norfolk, etc). * * * *Parties of second part agree to accept said commission upon the condition that they shall be employed as the sole and exclusive sales agents*, etc. * * *

(3) and (4) (More references to “*selling agents*” and provisions for liquidation of damages in case of breaches.)

(5) Castner, Curran & Bullitt guarantee to take charge of inspections, shipments and delivery, collections of bills, and pay charges, and to pay on the 14th of each month proceeds of all coal passing weigh scales of N. & W. R. R. during preceding calendar month, etc.

(6) *To keep accurate books of account of all transactions as such agents. * * * open to inspection of Pocahontas Company, and render account of sales each month, and prices obtained.*

In a word, the entire purpose and effect of the contract in question was to constitute the firm of Castner, Curran & Bullitt selling agents of the Pocahontas Coal Company. The plain import of the language employed is to create the relation of factor, under a *del credere* commission—an agency pure and simple, with clearly defined limitations of power and equally clear obligations of accountability. Castner, Curran & Bullitt are (1) to sell for the Pocahontas Company; (2) to collect and guarantee payments; (3) to render an account of sales and remit proceeds; (4) to make advances on shipments; (5) cover expenses of selling; (6) to sell at prices fixed by Pocahontas Company; (7) and to receive as compensation a percentage on sales—all these are consistent only with the relation of *agents*, and are entirely inconsistent with the relations of *purchasers*,

The case is in some respects similar to that of *Wilcox & Gibbs Co. v. Ewing*, 141 U. S., 627, where the contract gave Ewing exclusive rights of sale in certain territory at prices fixed by plaintiff; required him to purchase twenty thousand dollars' worth of machines during the year 1875, and to maintain regular retail rates, and defendant bought of the company the agency property and leased from them the building required to do business. The court (Justice Harlan) held that the contract was one of agency and terminable at the will of the principal, subject to existing contracts made by agents.

The case of *Ex parte White in re Neville*, L. R., 6 Ch., 397, relied upon by the movers, has no application. The controlling feature in that case was the fact that the purchasing party was accountable only for a fixed purchase price and

was entirely untrammelled as to his selling price—his compensation being a profit and not a commission.

Tested by well-established principles, the contract in the present case provides for nothing more than incidents of a *del credere* agency. A factor under a contract guaranteeing the price of goods sold is none the less an agent occupying a fiduciary relation to his principal. *Baring v. Corrie*, 2 B. & Ald., 127; *Ex. p. White, in re Neville*, L. R., 6 Ch. App., 397. Other matters shown in the affidavits and relied upon as proving a relationship of purchaser rather than agency, are within the usual incidents of a *del credere* agency. A factor under such a commission may not only sell in his own name, but, for many purposes as to third parties be regarded as the owner. He has, in fact, a special property in the goods by virtue of his lien for advances and commissions. 63 N. W. Rep., 720; 23 Wall., 55. While he may insure in his own name (120 Mass., 449), sell in his own name, and even sue in his own name for the selling price, nevertheless the title to the goods remains in the consignor until sold. 38 W. Va., 158. See, generally, *Wittowski v. Harris*, 64 Fed., 712; *Morris v. Clusby*, 4 M. & S., 566 (574); *Grove v. Dubois*, 1 T. R., 112; *Gould v. Lee*, 55 Pa. St., 99; *Cushman v. Snow*, 186 Mass., 169.

The relation of the firm of Castner, Curran & Bullitt to the Pocahontas Company being that of agency, the coal on hand on January 8, 1903, in the yards of Castner, Curran & Bullitt was the property of the Pocahontas Company, subject to whatever lien existed in favor of Castner, Curran & Bullitt for their advances and unpaid commissions. For like reasons the firm of Castner, Curran & Bullitt were not debtors of the Pocahontas Company in respect of moneys due, in the ordinary sense, because their relation as factors was a fiduciary one.

No reason appears, therefore, why the officer holding the writ of attachment could not have levied the same upon the coal in the yards, because it is admitted that coal was there in large quantities in possession of Castner, Curran & Bullitt under its contract relations with the Pocahontas Com-

pany—which we find to have been the property of the Pocahontas Company. *Davis v. Lewis*, 16 C. C., 138.

Under these circumstances, it is manifest that the plaintiff in attachment has failed by the proceedings thus far taken to secure a proper anchorage for the jurisdictional power of the court, which, in these cases, as already shown, depends upon an actual bringing of tangible property *in custodia legis* through strict observance of the means pointed out by statute.

The motion will be granted and the attachments dismissed, but without prejudice.

Drausin Wulsin and *F. O. Suire*, for plaintiffs.
W. C. Herron, for defendant.

SARAH J. SIMPSON V. THE EGAN COMPANY, A CORPORATION, ETC.

1. An agreement for sale of lands in consideration of stock in an incorporated company to a specified face value amount, with an agreement to re-purchase the stock at or before the expiration of ten years at a specified amount in cash, is an entire contract and not divisible. The stock consideration was received and paid subject to the vendor's right to redemption in money.
2. The vendor in case of refusal of vendee to pay the stipulated price, upon tender of the stock and demand, may sue for the amount due as upon the main contract. The option to have the stock redeemed does not involve an agreement of the company to purchase stock, in the ordinary sense, and the doctrine of *ultra vires* can not be invoked as a defense.

HOSEA, J.

Demurrer to petition.

The petition sets forth, in terms, a contract whereby the Egan Company, defendant, purchased of Mrs. Simpson a certain lot of ground and building thereon, agreeing to pay

in stock of the J. A. Fay & Egan Company (preferred or common, at her option), to the face value of \$30,000, with an agreement to repurchase the stock, at or before ten years, at \$45,000.

The property was duly conveyed by direction of the Egan Company to the J. A. Fay & Egan Company, its nominee, and the stock duly delivered.

At the expiration of the ten years, on Feb. 16, 1903, Mrs. Simpson tendered the stock to the Egan Company, and demanded the \$45,000; and, both tender and demand being refused, she avers that she then and thereafter treated the stock as her own at its then market value of 70 per cent. (or \$21,000), and sues for the difference between this and the contract price of \$45,000, *i. e.*, \$24,000, with interest, aggregating \$30,000.

It does not seem to me necessary upon this demurrer to consider the doctrine of *ultra vires*, invoked and resisted so ably and exhaustively in argument. The true ground of decision lies beneath and renders such considerations in a sense premature at this stage.

The averments of the petition, up to and including the tender and refusal, state a case for the enforcement of the option and for the recovery of the sum of \$45,000 (upon a continuing tender of the stock), as, in effect, the guaranteed purchase price of real estate conveyed; but the pleader at this point has diverged, upon a theory, apparently, that the guarantee clause in question may be treated as an independent agreement for the purchase and sale of stock, and thus bring it within the rules of, and thereby obtain advantages peculiar to, the law merchant.

This, however, can not be done, for the reason that the agreement is an inseparable part of the main contract and governed by it. The stock consideration for the purchase was paid and received subject for a fixed period, to the vendor's right to have redemption in money. This clause was not a contract for the bargain and sale of stock upon which a tender could be made of any stock of that kind and amount, but an option to deliver up the particular stock, held at the consideration of the sale of the real estate, and

receive cash in lieu thereof. It was, in effect, a guarantee of the value of the stock originally paid. If the stock itself should appreciate, as guaranteed by the vendee, the vendor would have no occasion to exercise the option; but if it did not appreciate, then she might return it and demand the money.

It seems clear, therefore, that the rights and liabilities of the parties in relation to the stock are not subject to the law merchant as upon ordinary bargain and sale; but are necessarily governed by legal rules applicable to the contract as a whole.

The plaintiff, under this covenant, could do but one of two things: either waive the optional right and rest content with the stock, or tender back the stock and demand the \$45,000. Upon tender and demand refused, the right of action was upon a continuing tender in court, to have judgment for the full sum with interest from date of the original tender and refusal. She could not, upon refusal of tender, retain the stock at an assumed value and have judgment for the difference between such sum and the guaranteed value.

It is manifest that this prayer of the petition is not in harmony with the premises and is in the nature of a *non sequitur*. The facts stated do not legally constitute a cause of action for the relief demanded, and therefore the demurrer must be sustained.

If the plaintiff had sold or otherwise parted with the stock, such act would clearly have been a waiver of the option to have it redeemed in money; and the judgment of dismissal must have followed the sustaining of the demurrer. The allegations of the petition, however (the stock being still in possession of Mrs. Simpson), leave the question of waiver open to proof and argument, and amendment will therefore be allowed.

Demurrer sustained, with leave to amend in ten days.

Harlan Cleveland and John E. Bruce, for the demurrer.
Sayler & Sayler and John C. Healy, contra.

SARAH J. SIMPSON v. THE EGAN COMPANY.

1. A written contract for the sale of lands payable in stock of an incorporated company with an agreement to re-purchase the stock in ten years at a stipulated price, is, in its last analysis, a contract obligation to pay the contract price in money, if demanded by the seller at the expiration of the stipulated period.
2. Upon tender of stock and refusal to pay, the action is practically one at law for money only. The stock consideration was subject to redemption in money. It was not an agreement to receive an equal amount of stock but an option to deliver back the particular stock sold and receive a stipulated cash consideration. It was, in effect, a deferred payment secured by the stock during the stipulated period.
3. An incorporated company entering into a contract against its granted powers, estopped, after fully receiving and enjoying the benefits from setting up as a defense its want of power to make the contract.

HOSEA, J.

Demurrer to second amended petition.

Suit is for the purchase price agreed to be paid for real estate in Cincinnati upon a contract, in substance as follows: The defendant proposed in writing on February 16, 1893, to buy the property described and to pay for the same \$30,000 in stock of the J. A. Fay & Egan Company, agreeing to buy said stock from the holder thereof on or before ten years from said date at \$45,000, which proposal was duly accepted. Other incidents of the contract are not material to the present inquiry.

The demurrer is general, grounded upon insufficiency of facts. Under the demurrer, the acceptance of the proposition constituting a contract in due form, the due conveyance of the property and its possession during the ten years, and at the present time by the defendant, are admitted; as also are the tender of the stock and demand refused.

The argument in support of the demurrer is based wholly on the doctrine of *ultra vires* as bearing upon the agree-

ment to purchase the stock at the expiration of the ten years.

I have carefully reconsidered the construction of the contract in question adopted tentatively in passing upon the first demurrer. As then stated:

"The agreement (as to purchase of stock) is an inseparable part of the main contract and governed by it. The stock consideration for the purchase was paid and received subject, for a fixed period, to the vendor's right to have redemption in money. This clause was not a contract for the bargain and sale of stock upon which a tender could be made of any stock of that kind and amount, but an option to deliver up the particular stock held as the consideration of the sale of the real estate and receive cash in lieu thereof."

This seems to me to correctly state the legal meaning of the contract in question. The agreement does not intimate that the value of the property as embodied in the consideration was \$30,000. On the contrary, the wording of the contract seems carefully chosen to avoid such inference. The agreement is to pay so much in stock at face value, and *in further consideration*, to repurchase said stock in a given time at \$45,000.

It was said in the former opinion that this was, in effect, a guarantee of the value of the stock originally paid; but perhaps a more accurate statement of the nature of the contract is that it provided in effect for a deferred payment of \$45,000 secured by a delivery of stock of the face value of \$30,000.

In either aspect, the applicability of the doctrine of *ultra vires* is questionable.

So far as the plaintiff is concerned, the conduct was fully executed by the transfer of title and possession of the property pursuant to the contract ten years ago. Can the defendant now plead its want of power to make the contract as a defense to a suit for the price?

In *Hayes v. Galion Gas Light Co.*, 29 O. St., 330 (340), it said:

"The rule seems well established that when a contract has been executed and fully performed on the part either of the corporation or of the contracting parties, neither will be permitted to insist that the contract and such performances by the one party were not within the power of the company." (Citing 7 Ohio, 412; 63 N. Y., 62; 4 D. G. McG., 19; 5 McG., 131.)

This case is based upon *Bank of Chillicothe v. Mayor, etc., of Chillicothe*, in 7 O. 315 (2 vol. ed.), wherein Judge Hitchcock examines the question with exceeding care and fullness upon the following apt paraphrase of the question itself:

"True, you loaned us this money, you did it at our earnest solicitation, we have used it for our own benefit, but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this, our wrongful act, to protect ourselves from the payment of that which is your honest due."

These views have been further emphasized in later Ohio cases, namely: 40 St., 274, *Larwell v. Savings Society*; 47 St., 296, *Armstrong v. Karshner*; 60 St., 96, *Gas & Fuel Co. v. Dairy Co.*

It will be observed that in these cases the principle of decision is that of estoppel—where the entire completion of performance on one side, together with continued possession and enjoyment of the usufruct, makes it an inequitable thing to refuse to yield the consideration contracted for.

The great weight of judicial authority in the United States upholds the proposition that where a private corporation has entered into the contract against its granted powers and has received the fruits or benefits of the contract, it is estopped from setting up the defense of no power to make. Following are some of the later cases: *Lurton v. Jacksonville Loan Ass'n*, 87 Ills. App., 305 (aff'd 187 Ills., 141); *People v. Suburban R. R. Co.*, 178 Ills., 594; *Manchester Rwy. v. Concord Rwy.*, 66 N. H., 100; *Union Bk. v. Wright* (Tenn.), 58 S. W., 755; *Smith v.*

Farries (Cal.), 51 Pac., 710; *Union Hardware Co. v. Plume, etc., Co.*, 58 Conn., 219; *Wright v. Hughes*, 119 Ind., 324; *Beach v. Wakefield*, 107 Iowa, 567; *Opera House Co. v. Mercantile Co.*, 59 Kansas, 778; *Butterworth v. Knitzer Co.*, 115 Mich., 1; 57 Mich., 146 (Cooley, C. J.); *Natches v. Mallery*, 54 Miss., 499; *International Co. v. Davis Mfg. Co.*, 70 N. H., 118; *Chapman v. Ironclad Co.*, 62 N. J. L., 497; *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y., 333; *Tyler v. Tualatin Academy*, 14 Oregon, 485; *Pittsburg, etc., R. R. Co. v. Shaw*, 14 Atl., 323; *Williamson v. Eastern Building Ass'n*, 54 S. C., 582; *Brillen v. Milwaukee Trading Co.*, 199 Wisc., 41; *contra Sioux City Terminal Co.*, case 178 U. S., —.

Demurrer overruled.

John R. Sayler and John C. Healy, for plaintiff.

Harlan Cleveland and Bromwell & Bruce, for defendant.

THE UNION SAVINGS BANK & TRUST CO. V. THE VILLAGE OF
NORWOOD.

1. Where a road is contracted for and built with reference to a special fund raised by taxation for this purpose and no other, and a certain percentage of the contract price is retained for a specified period upon a trust not yet expired, whose further performance is rendered impossible by wrongful acts of the municipality, a right of action arises to determine the trust and for the balance remaining unpaid.
2. In such case, the court will enjoin the waste or misapplication of the fund by the municipality *pendente lite* upon a proper showing of facts.
3. The remedy of the contractor in such case is in equity, since it involves a rescision or cancellation of the time limit that could not be reached at law.

HOSEA, J.

Demurrer to amended petition, as showing no ground for equitable relief.

The special points of the petition involved in this demurrer in substance are that the road was contracted for and built with reference to a "special fund raised by taxation for this purpose and no other"; that a certain portion of this fund, being a percentage of the contract price, was retained for a period of five years, not yet expired, upon a trust specified in the contract; that under said trust the village has paid certain amounts unknown; and that the conditions as to the subject-matter of the contract and upon which the said trust was instituted [or declared], having been so altered and destroyed by wrongful acts of defendant as to render further performance by plaintiff impossible; therefore, the trust should be determined and an accounting had, with a decree for any balance found to be due, and with injunction against further waste and misapplication *pendente lite*.

These allegations seem to set forth valid grounds for consideration in equity. It is manifest that a suit at law can not be maintained until the expiration of the five years' period provided in the contract for the retention of the balance of purchase money.

The suit asks, in effect, that the contract be rescinded or canceled as to this feature, and the plaintiff excused from performance; and this can be done only in chancery. Moreover, what might be the right or want of right of a party under municipal contracts as to payment out of a particular fund, in cases of bonds and the like (cited against the demurrer), the allegation here relates to a particular fund set apart and held by the defendant by virtue of a trust created by the parties under this contract; and further, that payments have been made by defendant which render uncertain the amount actually due plaintiff, until an accounting is had to ascertain and separate lawful from unlawful payments. The injunction is asked to prevent further threatened waste and misapplication of the fund.

The plaintiff, it is true, alleges inadequacy of his legal remedy, only upon the ground that if his right to this fund be not recognized in equity, he will be remitted to a protracted and expensive lawsuit as upon a debt, and I am

inclined to think that this might be sufficient in connection with the allegations of the petition; but for the additional and stronger reason, that at this time and without a recession or cancellation of the time limit of the contract, no action at law would lie, and consequently a remedy at law is not only inadequate, but non-existent, I must overrule the demurrer.

Demurrer overruled.

W. W. Symmes, for plaintiff.

Wm. R. Collins, for defendant.

ANDREW R. JAMES V. ISABELLA R. JAMES.

1. An entry of "tax not tendered" is not a sufficient compliance by the county auditor with the statute requiring him to certify upon the tax duplicate the "reasons why the taxes could not be collected." Until the treasurer has exhausted his duties of collection, there can be no showing of reasons for non-collection and a tax deed given upon such a showing is invalid.
2. A claim of support by an aged mother against a son can not be maintained under the statute in this behalf. The statute is punitory in behalf of the state, and can not be invoked between parties in a private action.

HOSEA, J.

This cause was heard and submitted to the court for decision upon the pleadings, oral testimony as to waste, an agreed statement of facts as to the other matters involved, and upon oral arguments and briefs of counsel.

Plaintiff, who holds an estate in remainder in a certain lot of land and residence thereon in Walnut Hills, charges that defendant, who is in possession under her life estate in the premises, has committed waste by failure to repair, to the damage of his estate in the sum of \$500, has failed to pay taxes and assessments now charged against the property in the sum of \$331.93, and has suffered the property

to be sold by the county treasurer in consequence of said non-payment of taxes, wherefore he asks that the life estate of defendant be declared forfeited, and for recovery of the premises and judgment for damages in the sum of \$831.93.

The defendant admits the non-payment of certain specified taxes and that a pretended tax sale was made, which she alleges was void, and denies all other allegations.

By way of counter-claim she avers that she has paid \$258.49 of street and sewer assessments upon said property, and \$75 still remains due as the annual installments payable in 1898 and 1899 and charged upon the tax duplicate of 1900, and prays dismissal of plaintiff's action and a decree apportioning the amount of said assessments and interest and for costs.

At this stage of proceedings Grace B. James, upon her motion, was made a party and files an answer and cross-petition, and admits the tax sale alleging that such sale was made to her for \$208.26, and that the property in question was thereupon deeded to her by the auditor of the county, and that she is entitled to possession, and she asks judgment for same against her co-defendant. The answer filed by the original defendant to this intervening cross-petition avers that Grace B. James is not a proper party to the action, that the alleged tax sale is void; and asks for dismissal of the cross-petition of Grace B. James.

Plaintiff's reply admits the tax sale to Grace B. James, who is plaintiff's wife; admits payment by Isabella R. James of sewer and street assessments, amount unknown; and admits the description in advertisements of treasurer and in tax duplicate to be "Isabella R. James, pt., lot 28, 46 x 110 feet, Lane Seminary"; and that the original note by auditor on duplicate is "payment not tendered."

Under ordinary circumstances, Grace B. James would have no right in this suit, because the real contest here is between the remainderman and the life tenant, by which her interests are not affected. But under the peculiar nature of the proceeding making the validity of the tax title a vital question, it is within the recognized rule for avoid-

ance of a multiplicity of suits to consider her a party in interest,

The conclusions of the court are as follows:

(1) *As to the tax title of Grace B. James.* The entry "payment not tendered" is not a sufficient compliance with the statute requiring the auditor to certify on the tax duplicate the "reasons why the taxes could not be collected." This is in fact no reason at all. The statutes point out the duties of auditor and treasurer in the collection of taxes, and empower the treasurer to institute various proceedings designed to facilitate such collections. I have fully discussed this subject in *State, ex rel Wilson, v. John H. Gibson*, decided in July, 1903, and subsequently affirmed in general term, and need not refer here to these duties further. Until the treasurer has exhausted his duties in regard to collection there can be no showing as required by the statute as to why the taxes "could not be collected."

The precise point, on the phraseology herein questioned, is decided by the circuit court for this circuit, in 18 C. C., 134, *Matthews v. Lewis*, Auditor.

That the reasons for non-collection must be stated, and that otherwise the tax deed is invalid, is held in 35 O. St., 209, *Stambaugh v. Carlin*.

It follows, consequently, that the tax deed in question is invalid, and the same result is deducible from the uncertainty of description of the property conveyed by the tax deed, under the fundamental rule that the deed must describe with certainty the land conveyed or contain within itself the means of certainty as to the land conveyed. 13 O. D. (N. P.), 256, *Boone v. Cincinnati*; 33 O. St., 395, *Humphries v. Huffman* (cit.: various earlier decisions of Supreme Court).

The tax deed being invalid from inherent causes, there is no forfeiture of the life estate of Isabella R. James under Section 2852, R. S. (52 O. St., 318, *Estabrook v. Royon*, Guardian). In view of the above findings, it is unnecessary to consider the constitutional questions presented and argued.

(2) *As to waste alleged against the life tenant.* From a consideration of the testimony and a personal inspection of the premises made in company with and at the request of both counsel, I find that the allegations of the position in this behalf are not sustained. The premises are occupied by the defendant, Isabella R. James, as a residence and is in a fair condition of repair.

The petition, therefore, must stand dismissed; and coming now to consider the cross-petition of the defendant, Isabella R. James, it appears:

(1) That she has paid various sums for street and sewer assessments and other sums still due; and she asks, under R. S., Section 2268, to have these various charges apportioned between her and the tenant in fee. I see no reason why this claim is not properly to be dealt with in this way under present circumstances, and the rights of all parties equitably adjusted (*Ward v. Ward*, G. C. C., 454). But in such adjustment, it may be necessary also to consider the rights of Grace B. James, who, being defeated upon her tax title, nevertheless has, by statute, a lien upon the life estate for (1) the taxes, interest and penalties legally due, with interest, and (2) amounts subsequently paid (R. S., Section 2880). Part of the amount paid by her is for assessments to be distributed between the life tenant and the tenant in fee.

The matter of calculation and distribution of these amounts can and ought to be ascertained and agreed upon by counsel and thus avoid the cost of a reference; and opportunity will be given counsel to this end by suspension of the final entry.

(2) As to the claim of defendant to support by plaintiff, while there is little doubt of the moral basis on which it rests, I am compelled to hold that the legal basis is wanting. The statute in this regard is punitive in behalf of the state, and can not be made the ground of a civil action by individuals concerned.

A decree interlocutory in its nature may be drawn, finding the facts and defining the rights of parties in ac-

cordance with this opinion, leaving the matter of distribution of assessment to be provided for in a final entry.

H. E. Engelhardt, for plaintiff.

Thornton M. Hinkle, for defendant.

MENTER AND ROSENBLOOM CO. V. GEORGE W. GRAY.

HOSEA, J.

Motions (1) to make petition more definite and certain, and (2) to strike out.

This is an action upon a contract for stipulated sum as liquidated damages for breach. As the action is not for a *quantum meruit*, but for an agreed sum in the nature of a penalty, it is a "special contract," and must be set forth in terms, or so much thereof as is involved in the cause of action, and is necessary to show a complete legal contract. *City of Lancaster v. Miller*, 58 O. St., 558 (569).

The petition is not aided by attaching a copy of the contract as an exhibit. The pleading, as such, must stand or fall by its own allegations.

See, also, Statute of Frauds, R. S., Section 4199.

(1) The motion to make definite will be granted.

Being an action upon a contract, it is only necessary to set forth the facts constituting the breach. All beyond this is surplusage in pleading.

(2) The motion to strike out parts designated, will be granted.

Motion granted.

Sanford Brown, for plaintiff.

Burch & Johnson, for defendant.

MENTER AND ROSENBLOOM CO. v. GEORGE W. GRAY.

1. The general knowledge of business or customers, such as would naturally be acquired by an employe (not involving special information in the nature of trade secrets) in the course of employment, may be used by him in his own behalf after leaving the business.
2. A stipulation in a contract of employment binding the employee not to engage or be, in any way, employed in the same line of business for a period of years under a forfeiture of a sum of money characterized as "liquidated damages," will be held void as in restraint of trade, where the circumstances show it to be unreasonable and unjust, as where it does not appear that any damage could ensue from a breach.

HOSEA, J.

Heard on demurrer to amended petition.

Plaintiff sues as assignee of the firm of Menter, Rosenbloom & Company, to recover the one thousand dollars (\$1,000) specified as a sum to be forfeited in and by a written contract of employment of defendant by plaintiff's assignors, in case he engaged in a similar employment within four years.

The contract in question, dated July 25, 1899, so far as material to the present inquiry, is in substance as follows:

Gray agrees to work for said firm by the week, working days beginning at 7:30 A. M., and ending at 8:30 P. M., excepting Saturdays, on which days service is to end at 11:00 P. M., at a weekly wage of fifteen dollars (\$15), as manager of the store known as "People's Outfitting Co.," subject to following terms, conditions and restrictions. Then follows a series of eleven restrictive conditions relating to the method of performing his duties and limiting the power of independent action and making him personally responsible for any deficiency in stock. The twelfth clause is as follows, in full:

"(12) In consideration of such employment by the week, and the knowledge thereby obtained of the business of second parties, their customers and trade, the said George

W. Gray hereby agrees and covenants, with said Menter, Rosenbloom & Company, that he will not, for the period of four years, enter into the same line of business, namely, the selling of ladies' and gentlemen's wearing apparel by the credit system, or conduct or manage such business in the city of Cincinnati, either for himself or any person or corporation, and that he will not, in that time in said city, hire himself to another or work or be employed in such line of business. In case of violation on the part of the first part, to the foregoing provision of Clause 13 of this contract, said first party shall forfeit to second party the sum of one thousand dollars (\$1,000), which sum is hereby agreed upon as liquidated damages therefor, and shall be considered as such and not a penalty.

"It is understood that first party shall have no power to act for the firm except as herein provided."

(The reference to Clause 13 is evidently a clerical error and means Clause 12. The terms of the stipulation leave it doubtful whether the four years' period runs from the date of the contract or its breach; but as plaintiff's counsel assume the first to be its proper construction, such will be assumed here.)

The petition, as originally filed, stated as a cause of action a breach of the contract in that defendant had left plaintiff and engaged with another in a similar business of selling wearing apparel "on the credit or contract plan," in Cincinnati, before the expiration of the stipulated period of four years, from July 29, 1899, whereby plaintiffs had been damaged to the extent of one thousand dollars (\$1,000), for which sum they asked judgment, together with equitable relief.

In consequence of an order requiring the striking out of evidential matters, an amended petition was filed—the subject of the present demurrer—which amended petition omits the allegation of damages and prays judgment directly upon the contract for the stipulated sum.

A contract for a penalty has been defined as an agreement to pay a stipulated sum in case of default to coerce per-

formance or to secure payment of the actual damages. *U. S. v. Cutajar*, 67 Fed., 530.

By the English statute the injured party in an action for penalty under a contract is limited to the collection of actual damages. This principle has been largely adopted in this country and generally exercised by courts of common law, and the doctrines of equity applied in actions at law in determining, upon construction of the contract, whether the stipulated sum is penalty or liquidated damages. 2 *Page on Contracts*, par. 1170; *Hennessey v. Metzger*, 152 Ills., 514.

The courts have generally shown a marked desire to lean towards that construction which excludes the idea of liquidated damages and permits the party to recover only damages actually sustained. *Badloff v. Haase*, 196 Ills., 368; *Heatwolfe v. Gorrell*, 55 Kansas, 695.

The reason for this is that actual damages in the nature of compensation for the injury is the fundamental principle of the law governing redress of injuries. *Wattis v. Carpenter*, 13 Allen (Mass.), 19; *Farrar v. Beeman*, 63 Texas, 176.

Unless, therefore, there is some special element involved in it upon which damages may be predicated, such contracts are almost always construed as for a penalty. *Knox, etc., Co. v. Grafton Co.*, 16 C. C., 21.

In placing a construction upon such a contract the terms used by the parties are not conclusive. The meaning and legal effect are to be made out from the actual facts. *Grasselli v. Lowden*, 11 O. S., 349, 361; 1 *Sedgwick on Damages*, par. 406.

The general rule, as a guide for determination, given by *Sedgwick*, is as follows:

"Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as a compensation, and is in fact reasonable, it will be allowed by the court as liquidated damages." 1 *Sedgwick on Damages*, par. 406. See, also, *Keck v. Beiber*, 146 Penn., 645; *Wilkinson v. Colley*, 164 Penn. State, 35.

Coming now to a consideration of the contract stipulation in the light of these authorities, we are to regard the circumstances as they existed when the contract was made and not as they existed when the alleged breach occurred. (*Gibson v. Oliver*, 158 Penn. State, 277.) And this follows from the fact that the object of construction of a contract is to determine the intent of parties in making it.

The contract here is one of employment in respect of duties, chiefly those of a clerk and salesman, and had to do with the ordinary incidents of trade in selling wearing apparel at retail. There does not appear to be anything about the business of a special nature involving "trade secrets"—nothing but what is and must be common in every such business—or any business of a kindred character, dealing in commodities of every-day use. The fact that sales, or some of them, were made on credit, payable in installments, gives it no special character. All sales made on credit, in every business, involve inquiry into the financial responsibility of the purchaser, and such information is usually acquired through channels open to every one.

The general knowledge of business methods and of customers, to be gained by an employe, such as any clerk similarly employed would naturally acquire in the business, he would have a right to use for his own advantage in leaving it. *Seifried v. Maycox*, Index Apl. 20, 1904; citing *Robb v. Green*, 2 Q. B. Div. (1901), p. 10.

But, manifestly, no damage could flow from the fact, *per se*, of defendant entering into the employment of another in the business of selling clothing by the "credit system" in Cincinnati. The stipulation is against "entering into the same line of business," in any capacity, even to "hiring himself to another to work or be employed in such line of business." This restriction would deny him employment, even as porter in a clothing store; yet it is obvious that such employment could not possibly work any disadvantage to plaintiff. The illustration serves to show that the stipulation in terms is one in restraint of trade, and is, moreover, without consideration and unenforceable; for if there had been no injury to be guarded against, there is nothing in respect of

which the plaintiff is entitled to protection or that can be the subject of damages to be liquidated.

Injury could only flow, not from the mere entering into other similar employment, but from making an unfair use therein of confidential information of a special nature gained while in the employment of plaintiff.

It is clear, therefore, that the stipulation goes beyond what is necessary for the protection of plaintiff, and is therefore harsh and oppressive upon the defendant, and is in the nature of coercion and not a pre-adjustment of compensation for an injury; for *non constat*, but defendant might even conduct and manage a business of his own with a different method of business and line of custom without making any unfair use of his knowledge or causing any injury to plaintiff whatever.

As said by Judge Minshall, in *Luffkin Rule Co. v. Fringelli*, 57 O. St., 596:

"The presumption of illegality (to be overcome by the party enforcing the contract) arises from the fact that any restraint of the kind tends to oppression by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and consequently the community, of the services of a skillful laborer. * * * These considerations and others of a like character constitute, in great measure, that sound public policy which looks with distrust upon all agreements in restraint of trade. * * * Therefore, contracts whereby men are purchased out of their business and restrained from carrying it on anywhere else, should receive no aid from the courts."

If the contract is to be taken literally, as its terms import, it must be held void for want of consideration and as against public policy. But it may be claimed to mean and be, in effect, a stipulation against using the special knowledge gained in plaintiff's employ in the business of another or in any way unfair competition. This derives some support from the language of the stipulation—"in consideration of the knowledge thereby gained of the business of the second parties, their customers, and trade." Even on this basis, the "forfeit," as a stipulated amount, would be un-

reasonable, for the reason, among others, that it makes no distinction between an injury that might result from unfair and injurious conduct extended through a period a little short of four years, or continuing for but one day. (See in this connection, and also apropos of the word "forfeit," *Heatwole v. Corvell*, 35 Kansas, 695.) In this aspect of the case also, the amount stipulated must be regarded as a penalty and not as liquidated damages. It follows that the present petition, being for the recovery of the forfeit *per se*, is demurrable.

If amended to claim only actual damages suffered—as in the original petition—setting forth the contract upon the meaning indicated, it may be that plaintiff can show his right to the opportunity of proof before a jury.

Demurrer sustained, with ten days leave to amend.

Sanford Brown, for plaintiff.

Burch & Johnson, for defendant.

THE GERMAN NATIONAL BANK OF WAUSAU, WISCONSIN V.
JOHN B. MARTIN ET AL.

1. Interpleader is allowed for the protection of one who makes no claim to the subject of the action. Any other action in the nature of a claim is inconsistent therewith and the pleader must elect between them.
2. Where the indebtedness is a note payable to payee or order, it accrues to the holder by indorsement for value, at maturity, and creditors who serve notices of garnishment upon the payee subsequently to such transfer have no interest in the note.
3. Where these facts appear on the face of the petition and no defense other than relates to the interpleading parties, is made by the payee, the interpleading cross-petitions may be stricken from the files and judgment rendered on the pleadings.

HOSEA, J.

Motion for judgment on the pleadings.

Plaintiff sues as owner of a promissory note executed by the defendant, Martin, on October 1, 1903, payable three months after date, for \$1,475, with interest, to Edward Bogen, and endorsed for transfer by Bogen on October 2. Martin answers, admitting the execution of the note to Bogen, presentation at maturity for payment, his refusal to pay the same; and that, as to all other facts set forth in plaintiff's petition, he "neither admits nor denies." Martin then, by way of so-called cross-petition, sets forth that at various dates he was served with notices in garnishment in suits brought by various parties against Bogen, and asks that these parties be made parties hereto and compelled to set up their claims, and that his own interest may be protected.

Plaintiff moves for judgment on the pleadings.

The so-called cross-petition attempting to bring in other parties, is neither drawn nor filed in accordance with the provisions of the practice code, Section 5016, which provides for an affidavit before answer. It neither disaffirms collusion with the third parties alleged to be claimants nor offers to place the fund in control of the court.

The argument by which it is attempted to support the cross-petition upon the continued existence of the old equity form of interpleader, seems to be based on a misunderstanding. The code provision is controlling in the specific cases to which it relates. As said in *Bank of Cadiz v. Beebe*, 62 O. S., 45, it was "intended as auxiliary to chancery practice theretofore understood and as directing the practice in the particular classes of cases named," and covers cases such as the one at bar.

But there are other serious objections. While the answer, for reasons to which I shall presently advert, does not in strictness tender an issue, yet it attempts in a modified sense to do so; for the defendant seeks to retain possession of the money, and have his interests protected—whatever that may mean—until the plaintiff litigates with the third parties; and it is questionable whether this course is not a waiver of the right of an interpleader.

An interpleader is permitted for the protection of one who makes no claim to the subject of the action, and submits it to the court, or avers his willingness to do so and also avers that it is without collusion with himself and the party claiming. It is obvious, therefore, that any other action in the nature of a claim, is inconsistent; he must elect between them, and the answer is an election. *Johnson v. Oliver et al*, 51 O. S., 20. 1

The cross-petition, moreover, in this case, is open to obvious criticism on the merits. The coincidence in the dates of the suits mentioned, with the maturity of the note sued upon, and the fact that the garnishment notices were in most cases served after the maturity of, and refusal to pay, the note, are at least suggestive. Moreover, the defendant appears to have answered the garnishee notices in those suits admitting his indebtedness to Bogen, whereas his indebtedness was upon commercial paper to Bogen *or order*. Therefore he could not know to whom he might be indebted at the maturity of the said notes, and it now appears that the note was in fact transferred by endorsement the day after its date. It is manifest, therefore, on the face of the cross-petition, that the parties named have no interest whatever in the note sued upon. *Kinsley v. Evans*, 34 O. S., 158.

Under the circumstances, and for the reasons given, the plaintiff will have leave to amend his motion forthwith by interlineation to include the striking out of the entire cross-petition.

Coming now to consider the answer upon the motion for judgment, Section 5320 of the practice code authorizes judgment upon the pleadings wherever the cause of action is not put in issue by the answer filed. By Section 5081 every material allegation of the cross-petition not controverted by the answer shall, for the purposes of the action, be taken as true. The answer here makes no issue of the liability of the defendant on the note.

The motion of the plaintiff as amended is granted. The cross-petition will be stricken from the files; and, upon filing the note, judgment will be entered against the defend-

ant for the amount of the note, with interest as prayed for.

Stephens, Lincoln & Stephens, for plaintiff.

THE CINCINNATI BEVELING AND SILVERING CO. *v.*
MICHAEL PRECHT ET AL.

Proceeding in Contempt.

Charges in contempt were filed in this cause on May 1, 1903, against *William Cooper, F. W. Schwegman, George Slayline, Charles Faber, Jos. Somhorst, D. Harrigan, Gus. Rolfus, John Schumacher, John Houser* and *Ben. Schmitger*, alleging disobedience, resistance and violation of a restraining order issued by Judge Rufus B. Smith of this court in this cause on March 23, 1903, duly served on each and every one of the defendants.

The restraining order prohibited these defendants and others, among other things:

(1) From interfering with any person in the employ of plaintiff or who may desire to enter or to remain in the employ of plaintiff, by way of threats, persuasions accompanied by threats, violence, insults, menaces, intimidations, or any other means calculated or intended to cause such persons to quit such employment against their free will, or to prevent such persons from entering into or continuing in the employment of the plaintiff against their free will.

(2) From congregating or loitering about or in the neighborhood of plaintiff's factory, with the intent to compel the employes of the plaintiff against their own free will to cease work for plaintiff, or to compel those who are seeking employment to desist from the same.

(3) From interfering with the free access of plaintiff's premises, and with their free return to their homes, boarding or other places to which they may desire to go.

(4) From visiting the employes of the plaintiff at their homes against their will, and with the intent of their using insulting, menacing and violent language for the purpose of intimidating and threatening said employes.

(5) From assaulting any of the employes of this plaintiff, or those about to enter its employ, with the intent of preventing said persons from entering the employment of the plaintiff and causing them to leave said employment.

With the charges were filed specifications setting forth various specific acts, with proper detail of time and circumstances.

The investigation of the charges was at a formal hearing and examination and cross-examination of witnesses in open court, both sides being represented by able counsel, and was fully argued at the conclusion of the testimony—these proceedings occupying two full days.

HOSEA, J.

I do not deem it necessary, at this time, to recite the testimony in any detail, as the same was taken stenographically, for any further use required.

On the part of the plaintiff, the presentation of facts, corroborated in numerous instances by various witnesses, fully sustained, to all intents, the specifications of the charges, and by consequence the charges themselves. On the side of the defense, the testimony was mainly confined to individual denials of participation in assaults and other more serious acts set forth in the specifications, whilst many material points were either not denied or were specifically admitted.

Neither does the case require a discussion of the legal rights and relations of employer and employed, as deduced from the authority of adjudicated cases, inasmuch as the sole question here presented is one of fact as to whether the order of the court had been violated.

The evidence establishes the fact that a "strike" is in progress at the factory of plaintiff, under the auspices of the Amalgamated Glass Workers' International Association of

America, Local No. 5, of which most or all of the defendants are members; that in aid of said strike, said organization has maintained, and is still maintaining, a so-called system of "picketing" in connection with plaintiff's factory on Oliver street, between Central avenue and John, in this city, with the avowed object and purpose of seducing away the employes of plaintiff ostensibly by persuasion and argument, but really, as judged by its character and results, for the purpose of producing a coercive pressure by intimidation of character clearly unlawful and prohibited by the terms of the injunction order.

It is shown that the so-called "pickets" are stationed in groups at both the near street corners, in numbers varying from three or four to eight or ten, directly in the path of the factory operatives going to and from their work to their homes, at the morning and evening hours, and that they also congregate near the factory at the noon hour. Others in sympathy with, but apparently not directly connected with the defendants, are nevertheless permitted to loiter with them, and contribute, at least by the addition of numbers, to the general intimidating effect of the system of picketing, as carried on.

But this general condition of intimidation has further and more serious elements. One case is shown where a group of men, five or more in number (including at least one of the defendants), passed by the factory at the noon hour, when the operatives were at the windows, and hurled the epithet of "scabs" at them across the street. Another in which the same offensive epithet was applied to the wife of one of the operatives in the dooryard of her home near by. Still another case of the same character is shown in evidence, with the additional annoyance of congregating and loitering about the house of a young operative with offensive and insulting conduct to the boy's mother at her home.

But still other and more serious elements of the strike situation are shown; namely, direct and brutal assaults on operatives, which, by whomever committed—whether by any of the defendants in person or not—were manifestly

committed by those in sympathy with the general purposes of the defendants, and in promotion of the strike.

Three of such assaults upon the operatives of plaintiff are clearly proven, one of which was so severe and dangerous as to confine the sufferer to his bed in care of a physician for several days, and bore cogent evidence of an attempt upon life by the use of a deadly weapon—which happily failed of effect. The man who was the object of this murderous assault testifies to previous persistent attempts of the defendants to seduce him away from his employment, and to threats against his life in case of refusal.

While direct testimony as to the identity of the assailants in these cases is lacking, yet the acts and declarations of various defendants, both before and subsequently, suggest such guilty knowledge if not actual connivance, as to make the defendants, for practical purposes, accessories; and it is candidly admitted by the defendants that although the fact of these assaults was known to members and officers of the union, yet no steps of any kind were taken or even suggested, looking to any preventive action, even to the extent of discountenancing such acts in connection with strike operations. The statements of witnesses who were officers of the union were to the effect that it was none of their business, and did not interest them.

Nevertheless, the testimony, as a whole, shows such concert of action and such unlawful purpose on the part of the defendants, as establishes the fact of unlawful conspiracy between the defendants and those associated with them; and it is elemental law that in such conspiracy, the acts and doings of one in furtherance of the unlawful purpose are the acts and doings of each and every other.

Whatever defendants in such cases may claim as the intention, the actual intention—concert of action being shown—must be judged by the character and results of the action itself; for it is also an elemental principle of law that a man's intentions are to be judged by his acts, and he is held, and properly held, responsible for the natural and inevitable consequences of his voluntary acts in virtue of an intention which the law conclusively presumes.

Viewing the status of affairs as shown by the testimony, in its general aspect, the defendants have maintained and are maintaining a condition which it was and is the manifest purpose of the injunction order to prevent; namely, a condition of active and offensive intimidation directed against the plaintiffs and their employes to compel acquiescence in their demands by seducing and driving away employes, and thus cripple the business of plaintiff, as a means to their desired end. The continuation of these conditions must produce serious injury to plaintiff, but is also a serious injury to the community at large.

The Bill of Rights of the Constitution of Ohio guarantees to every citizen as an inalienable right, among others, that of acquiring, possessing and protecting property, and of seeking and obtaining happiness and safety; and it is therein further provided that the courts shall be open to every one for the exercise of his remedy by due course of law for an injury done him in his land, goods, person, etc. No one need be told that the right to carry on a legitimate business freely, without molestation or hindrance, is not only the right and privilege of the citizen under the fundamental guarantees of the Constitution, but is essential to the well-being of every civilized community, and that it is the duty of courts to afford every reasonable protection to the exercise of such right.

The right of the laboring man, whose business capital is his skill or industry, is to be upheld and protected equally with the right of an employer of labor to carry on manufacture involving such employment, and the fact that the rights of these two are reciprocal, in no wise lessens the obligations of the courts to see that these rights are properly protected.

In the present case, this court, in the plain interest of justice and for the purpose of affording protection against unwarrantable molestation of the plaintiffs in the conduct of their business as manufacturers, issued the restraining order against the defendants and those co-operating with them; and there can be no question upon the evidence here, that it has been openly and persistently violated.

It is therefore the duty of the court to take action as the law provides, and according to its sworn duty.

Section 5640 of the Revised Statutes defines certain acts as contempts of court, among which are:

“Disobedience of or resistance to a lawful writ, process, order, rule, judgment or command of a court or officer.”

The sections immediately following relate to the method of bringing acts of contempt to the attention of the court, and of investigating same, and Section 5645 authorizes the limit of punishment in the event of the accused being found guilty. The punishment may be a fine or imprisonment, or both. It is the duty of the court, therefore, to announce its conclusions and take action in accordance therewith.

The parties charged will stand forth as their names are called:

F. W. Schwegman, John Schumacher, Charles Faber, Joseph Somhorst, John Houser, Ben. Schmitger, Geo. Slayline, D. Harrigan, Gus. Rolfus and Wm. Cooper.

You and each of you are charged with violating the restraining order heretofore issued by a judge of this court, and duly served upon you. The charge has been duly investigated in the mode required by law; you have been present throughout and met and heard the witnesses against you face to face, and have had the opportunity to testify and present witnesses in your own behalf, and have been represented throughout by able counsel who has zealously guarded your every right and presented your defense in full argument before me.

Having carefully weighed and considered all the testimony and the arguments thereon, I am satisfied beyond question or doubt upon the evidence that you and each of you are guilty of the contempt charged, and I so adjudge.

But, while all are guilty of violating the order of the court, the action of some is more reprehensible than that of others. Thus: Harrigan, Slayline, Somhorst, Faber and Schumacher appear to have been pickets, merely, carry-

ing out with varying degrees of pernicious activity the instructions of their union and its officers—as private soldiers carry out the orders of their superiors.

Schwegman and Cooper, however, were the treasurer and vice-president, respectively, of the union, and Schwegman seems to have been the active field officer, directing the action of others to a great extent. Cooper is shown to have actively entered the premises of young Frank Hay and took him out forcibly to compel him to quit the service of plaintiff. Both these officers stood by and permitted the union to give money to Rolfus, who, there is reason to believe, was a participant in one or more of the assaults, in order that he might leave the city after the service of the summons in contempt, and thus prevent his attendance in response to said summons. He was not a member of their union, therefore, they have not even this excuse to offer.

Schmitger, who seems to be known as “Jack the Fighter,” was guilty of a most flagrant offense at the door of the courtroom during the investigation, by insulting two of the witnesses, wives of two of the non-union operatives, with the manifest purpose of intimidation—an offense that might fully justify the application of a still more stringent statute without limitation as to the degree of punishment. Such actions bring disgrace upon the cause of labor and merit the condemnation of all good citizens. Before imposing punishment I will give an opportunity to each of you to say, if anything you have to say, why the punishment to be imposed should not be substantial and severe.

[No response.]

BY THE COURT: (The parties having declined response.)

It is ordered and adjudged that (1) D. Harrigan, (2) George Slayline, (3) John Houser, (4) Joseph Somhorst, (5) Charles Faber, (6) John Schumacher, having been adjudged guilty of disobedience of a lawful order of this court, to-wit, a restraining order issued in this cause on March 23, 1903, which said disobedience was and is a con-

tempt of court under the statutes of Ohio, be and each of them is fined in the sum of ten dollars (\$10).

That William Cooper, F. W. Schwegman and Ben. Schmitger, being adjudged guilty as aforesaid, be and each of them is fined in the sum of twenty-five dollars (\$25) and shall be imprisoned in the county jail for a period of five days.

That an attachment issue for Gus. Rolfus, and when brought in, that he be remanded to the custody of the sheriff, pending the further order of the court in the premises.

The restraining order of March 23—it may be well to state—is still in force; and while the others shown by the evidence to have taken part in its violation, can not be dealt with at this time, because no charges have as yet been filed, they and all others are to take notice that any further violation will be more severely dealt with.

(Upon application of counsel for defendants, concurred in by counsel for plaintiff, and promise on the part of defendants to refrain from any further violations of the order, the execution of the sentences was suspended until the further order of the court.)

Frank F. Dinsmore, for plaintiff.

Aug. Bruck, for defendants.

JOSEPH S. THOMA V. THE CITY OF CINCINNATI.

1. In a suit against a municipality for maintaining a nuisance, recovery of damages is subject to the rule that the plaintiff is required to use ordinary care to avoid or mitigate the injury; and if, by plaintiff's fault the extent to which his negligence contributes can not be distinguished, the ordinary rule of contributory negligence applies to defeat recovery.
2. Where it is apparent that a new trial upon an adverse verdict would mean only an opportunity to secure nominal damages, a new trial will not be granted.

HOSEA, J.

Heard on motion for a new trial.

The argument in favor of the motion for a new trial seems to ignore the status of the case as it finally reached the jury. The original pleadings presented a case of damages for deprivation of a property right namely, plaintiff's right of drainage into Lick Run. As the testimony progressed, it clearly appeared that this could not be maintained upon the facts charged, namely, the building of a sewer in the bed of Lick Run. The trial was allowed to proceed, however, upon an amendment to the petition converting the issue into one for the maintenance by the city of a continuing nuisance in a public highway for a period within statutory limitation—it being conceded by counsel for plaintiff that there could be no recovery beyond four years prior to bringing the suit.

Upon this issue the citations of authority presented by counsel to support the motion do not seem to me altogether applicable. It is true that the general principles of servient easements were explained to the jury (*Blue v. Wentz*, 54 O. St., 254-5), and perhaps at greater length than was necessary for the purposes of the case upon the final and real issues; but any error in this regard was rather favorable than prejudicial to plaintiff.

The issue being for the negligent maintenance of a nuisance by the city, the question of fact was for the jury to find whether the injury complained of was caused by the act of private owners on their own lands or by the city on the public way. But even if the cause of the injury was attributable to the city, recovery of damages is nevertheless subject to the rule that the plaintiff is required to use ordinary care to avoid or mitigate them. *Sh. & Redfield on Negligence*, Section 741; *Baldwin v. Tel. Co.*, 45 N. Y., 744; *Damon v. Lyons City*, 44 Iowa, 281; *Ellis v. Iowa City*, 29 Iowa, 230.

In the present case, the plaintiff's claim was handicapped by his four years' knowledge of the conditions claimed to be injurious before his right of present recovery could begin, and by the further year's delay in bringing his action,

with no explanation of it and no effort made apparently to prevent the recurring injury. Again there was testimony tending strongly to show that the injurious conditions complained of were in part due to subterranean seepage which had been formerly carried off by a subterranean drain beneath the road and through private grounds into Lick Run, which drain plaintiff had allowed to be cut off and disused.

Still, again, the testimony as to back-water running into the cellar from the street showed that it came through an opening in the pavement and flush therewith; and that while upon occasion of rainstorms water overflowed the pavement and found its way to the cellar, it was by no means clearly shown that this was the case in ordinary—as distinguished from *extraordinary*—rainstorms, nor was it shown that the continuance of water in the cellar between storms was due exclusively to this cause. In fact, there was some testimony indicating that even before the creation of the injurious conditions claimed, the subterranean drain played an important part in keeping the cellar dry. Moreover, there was no testimony whatever indicating that the cellar-opening through the pavement was necessary in that place and could not have been changed at slight expense to the side yard of the house where the ground was higher, or placed within the house itself.

In fact, taking the case by its four corners as presented to the jury, it seemed to me to fairly come within a further rule of law, namely, that if, by plaintiff's fault, the extent to which his own negligence contributed to the injury can not be distinguished, then the ordinary rule of contributory negligence applies to defeat recovery. *Sh. and Redfield on Negligence*, par. 741; *Potter v. Warner*, 91 Penn. St., 362; *Hibbard v. Thomson*, 109 Mass., 286.

Upon the motion for a new trial, therefore, even if the jury had been charged as counsel claim it should have been, namely, to permit plaintiff to recover as for deprivation of a property right, and allow the testimony as to plaintiff's contributory negligence to be considered only in mitigation of damages, it seems to me clearly evident in consideration of their actual finding, that the jury would have found

nominal damages only. Taking the testimony all together, it can not be said that the verdict "can not be right" (3 Graham and Waterman on New Trials, 1239). Indeed, the conceded fact that there was formerly an underground drain to the cellar which—as one or more witnesses stated—kept it dry, together with testimony that water has practically stood in the cellar continuously ever since, very strongly suggests that the principal cause of the difficulty lay outside of the present case. In fact, the proof of the continuity of the condition here shown where the assumed cause is intermittent and operative only at comparative long intervals, must have had a forceful bearing on the verdict.

Under all these circumstances, I do not think the opportunity to secure nominal damages would be a sufficient ground for a new trial, even if the errors claimed existed. *Hyatt v. Wood*, 3 Johns, 239; *Allen v. Sawyer*, 2 Pa., 325; *Sampson v. Appleyard*, 3 Wilson, 272; *Alsop v. Day*, 4 Day, 42; *Brazier v. Clapp*, 5 Mass., 1.

Motion overruled.

Morrill & Jordan, for plaintiff.

Jesse Lowman, City Solicitor, and *Geo. H. Kattenhorn*, Assistant City Solicitor, for defendant.

WM. H. DONALDSON V. THE SUTHERLAND MANUFACTURING Co.

1. Where a contract technically entire but contemplating delivery of a number of distinct things not physically connected nor dependent on each other, is partially performed and complete performance is rendered impossible through no fault of the contractor, the latter may recover *pro tanto*. The right of recovery in such cases depends upon the subject-matter and not upon the entire or severable nature of the contract as such.
2. The doctrine of incomplete performance as a defense applies only to entire contracts in the sense of the entirety of the thing contracted for and does not apply where the breach goes only to one or more of severable provisions having independent benefits.
3. Where both parties contract with reference to the continued existence of the thing with reference to which the contract is to be performed, the subsequent perishing of the thing excuses complete performance.
4. The recovery as upon a *quantum meruit* in these cases presupposes a termination of the contract; consequently the liability of the contractee can not be increased by subsequent tender of articles rendered useless to him by the destruction of the thing with reference to which the contract was to be performed.

HOSEA, J.; HOFFHEIMER and MURPHY, JJ., concur.

The facts, as conceded by counsel, are not in dispute, and the sole contention presented to us at the hearing is upon a question of law as a condition of liability.

The Sutherland Company are dealers in gas fixtures. Donaldson, who had about completed a residence near Fort Thomas, Kentucky, selected the fixtures he desired from the stock and samples of the company, for the various rooms of his house; and a schedule of these, with prices of each noted, was made the basis of a proposition by the company to furnish and install the fixtures at the aggregated price, and an acceptance by Donaldson, in the words: "Please enter my order * * * as per list and specifications of this date."

In the view we take of the case the precise legal nature of the contract is not material, but upon its face it would seem that the parties contemplated an order for specified

goods at stipulated prices, rather than a contract based on a single consideration and important *only* in its entirety.

One or two pieces were to be made to order, but it does not appear that the fixtures, as a whole, were in any way peculiar, characterized by any unity of design or connected in series or in any other relation one with another. They were, however, to be delivered and installed to Donaldson's satisfaction. No time limit was fixed, but the company proceeded with the delivery and installation room by room, from time to time, as he directed, until nearly all fixtures were in place. Donaldson and his wife expressed their entire satisfaction with each fixture as it was installed, and again with all that had been installed, and his satisfaction was admitted and emphasized by him on the stand. When everything was complete, except putting in two living-room fixtures in the house, for which he had not given directions, and one fixture at an exterior driveway, the house burned down and the work installed was destroyed. And at the time of the fire the house was occupied by Donaldson as a residence. The testimony thus shows acceptance and enjoyment of all but the three fixtures, and these three were ready, but installation delayed, as appears, by Donaldson himself. The latter fixtures were subsequently tendered and refused.

The defense below in the case is predicated upon the theory that the contract was entire and indivisible; and that, as the subsequent conditions made complete technical performance impossible, no recovery can be had for the part performed.

This position is neither just nor tenable in law. The right to recover under such circumstances is not wholly dependent on the entire or severable nature of the *contract* as such, but rather of the *subject-matter* of the contract. The subject contracted for may indeed be so entire and inseverable that no benefit could accrue to the vendee by the performance of part, but where the contract covers a number of entirely separate and independent things not physically connected or dependent upon such other, it is manifestly possible for a benefit to be derived from a part per-

formance which involves the delivery and installation of things complete in themselves. The distinction is well illustrated in the following two well-considered cases:

In *Filden v. Bailey*, 42 Mich., 100, it is held that a contractor to build a house can recover nothing if the house be not completed, or, if completed, be destroyed by fire before acceptance by the owner.

In *Atlantic, etc., Rwy. v. Construction Co.*, 98 Va., 503, it is held that if one of several buildings, to be constructed under one entire contract, has been accepted by the owner, the contractor may recover for his work if the building be subsequently destroyed by fire before the rest of the contract is performed.

So, also, in *Barrett v. Coke Co.*, 51 W. Va., 416, it is held that recovery may be had for goods accepted under a contract to furnish goods to the satisfaction of the vendee, if the vendee has, in good faith, attempted to perform, though the amount accepted was much less than the amount contracted for.

The doctrine of incomplete performance as a defense, in a word, applies only to *entire* contracts in the sense of entire subject-matter and does not apply where the breach goes only to one or more of severable provisions with independent benefits. Page on Contracts, Section 1603.

It would be unconscionable to deprive a vendor or contractor, in good faith, of a recovery for the benefit enjoyed by the vendee or contractor in the part delivered and accepted. In our own state a *wilful* or *unjustifiable abandonment* of the contract or a "*wilful breach*" are held to deprive a party of his recovery even where benefits are conferred. *Larkin v. Buck*, 11 O. St., 561; *Ginther v. Schultz*, 40 O. St., 104; *Witherow v. Witherow*, 16 O. St., 238.

But many authorities elsewhere uphold a recovery for benefits accepted and retained even where the breach or failure is wilful—and this is said to be the "more modern rule." *McDonough v. Marble Co.*, 112 Fed. Rep., 634; 3 Page on Contracts, Section 1603, and cases cited.

See, also, *Saunders v. Short*, 86 Fed. Rep., 225 (C. C. App.); *Watson v. Kirby*, 112 Ala., 436.

But the present case presents another reason why the rule denying recovery for part performance should not apply, namely, that where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent perishing of the thing excuses complete performance. *Singleton v. Carroll*, 6 J. J. Marsh (Ky.), 527; *Dexter v. Norton*, 47 N. Y., 62; *Wells v. Calnan*, 107 Mass., 514; *Nicol v. Fitch*, 115 Mich., 15; *Walker v. Tucker*, 70 Ills., 527; *Gould v. March*, 70 Me., 288; *McMillan v. Fox*, 90 Wisc., 173; *Anglo-Egyptian Co. v. Rennie*, L. R., 10 C. P., 271; *Ross Rodd Machine Co. v. Forbus*, 23 W. L. B., 217.

Thus, where one agreed to perform certain work and performs part, and is prevented from performing the residue without fault of either party, he is entitled to pay in proportion to the rate agreed upon for the whole. *Hargrave v. Conway*, 19 N. J. Equity, 281.

All the cases cited in behalf of plaintiff in error are of this character; and the rule of *Appleby v. Meyers* (L. R., 2 C. P., 651), is but the enunciation of a principle recognized and applied from a very early period, namely: "Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract." *Paradine v. Jayne*, Aleyn, 26; *Platt on Covenants*, 582.

But the tendency of modern jurisprudence is to recognize the principle we have stated as a limitation upon the above rule.

This principle is an obviously just one and has been applied by our circuit court in two well-reasoned cases. *Bailey v. Brown*, 9 C. C., 455; *Feike v. R. R. Co.*, 5 C. C., 109.

It will be seen from these authorities that the underlying principle is the equitable one of benefits conferred by the part performance. The question of entirety or severability of the contract is not involved, excepting as it relates to the subject-matter. If the subject-matter be entire, as, for example, a building, an elevator in a building, a steam heat-

ing plant, or any other thing which has no existence as a useful thing except it be completed as a whole, then, manifestly a part performance is useless to the vendee and confers no benefit; and, consequently, forms no predicate for recovery. All the cases cited in behalf of plaintiff in error are of this character.

The Supreme Court of Maryland says, in commenting on a diversity of opinion that seems to exist only through a failure in some cases to recognize the just distinction:

"On the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or the act of the parties." *Braumel v. Rayner*, 68 Md., 47.

See, also, *Young, etc., Co. v. Wakefield*, 121 Mass., 91; *Pierson v. Croks*, 115 N. Y., 539.

The English courts also recognize substantially the same limitation, namely: that after one party has performed the contract in a substantial part, and the other party has had the benefit of the part performance, the latter may be precluded thereby from relying upon performance of the residue as a condition precedent to his liability. In such case he must perform on his own part and rely on his claim for damages in respect of the defective performance. *Leake on Contracts*, 664; *White v. Beeton*, L. R., 10 Q. B., 564; *Behn v. Burness*, 32 L. J., Q. B., 204; *Ellen v. Topp*, 6 Exch., 424.

The question here, though technically determinable under the law of Kentucky, is really one to be decided upon the general law as it prevails there and elsewhere by the consensus of judicial opinion, and we have so treated it—although, as shown, the courts of Kentucky are in accord with the views expressed, and with that which has been the law of Ohio from very early times. *Bagley v. Bates*, Wright, 705; *Ames v. Sloat*, Wright, 577; *Newman v. McGregor*, 5 O., 349 (352).

The recovery, as upon a *quantum meruit* in these cases, however, presupposes a termination of the contract, and consequently the liability of a defendant can not be increased by tender of the articles not delivered into his possession prior to the destruction of the building. The verdict and judgment below are erroneous to the extent of the value of the articles tendered subsequent to the fire. Counsel for defendant in error, at the hearing, offered to remit the amount. Upon this being done, the judgment will be affirmed for the remainder, and it is so ordered.

Judgment affirmed upon remittur as indicated.

L. J. Crawford and *A. B. Benedict*, for plaintiff in error.
Kramer & Kramer, for defendant in error.

THE CITY OF CINCINNATI, BY CHARLES J. HUNT, SOLICITOR,
V. THE TRUSTEES OF THE CINCINNATI SOUTHERN
RAILWAY AND THE CINCINNATI, NEW OR-
LEANS & TEXAS PACIFIC RAILWAY
COMPANY.*

The Trustees of the Cincinnati Southern Railway, by their action in acquiring property and locating terminals in the vicinity of Mill creek, did not disclose an intention to make those terminals the sole and ultimate terminals of the railway in this city, nor did they thereby exhaust their power for acquiring land for that purpose. On the contrary, the act of April, 1898, confirms and amplifies the power originally possessed by the Trustees in that behalf, and the topographical features of the city and its railway requirements justify the location of the principal terminals on the lower ground near the river, as has been done. The omission of certain property, covered by the declaratory resolution and petition for condemnation, did not vitiate or render void the entire proceeding, but was within the discretion vested in the Trustees. Moreover, there is statutory provision, applicable to others and by implication to this railway, for the abandonment, even after verdict, of any or all of the property sought to be condemned and appropriated for railway purposes.

* Affirmed by Supreme Court, 70 O. St. 476.

HOSEA, J.; SMITH, J., and FERRIS, J., concur.

This cause comes up on reservation from the court at special term, upon demurrer of the Trustees to the petition filed by the city and the demurrer of the city to the answer of The Cincinnati, New Orleans & Texas Pacific Railway Co., lessees of the Cincinnati Southern Railway (herein referred to as the "lessee company").

The petition sets forth in substance the various acts of legislation under which the Board of Trustees of the Cincinnati Southern Railway was organized; the proceedings of the trustees whereby the railroad was located to and between its terminal cities; the adoption and publication of a policy respecting the location of a bridge over the Ohio river, and the location of freight and passenger depots; the leasing of the road to the lessee company; the acquisition of lands in the west end between the Ohio river and Harrison avenue, and expenditure for the same and for filling thereon, in behalf of the lessee company; and avers that, by the acquisition and filling of said lands, the trustees practically appropriated the lands between McLean avenue on the east, the B. & O. S. W. R. R. on the west, Hopkins street on the north, and Eighth street on the south; and that the trustees expended all the funds authorized up to that date, excepting a small balance, and had no power to provide further funds for terminal facilities.

The petition then sets forth the act of April 23, 1898, and the popular vote thereon, authorizing the modification and extension of the lease for sixty (60) years to October 12, 1966; the issue of bonds to an aggregate amount of \$2,500,000 for terminal facilities and permanent betterments; and the execution of the modified and extended lease, and the agreement respecting the issue of the bonds in installments, and for corresponding increased rentals under the lease,

The petition then proceeds to set forth the resolutions and proceedings for the condemnation of the property between Vine, Plum, Commerce and Water streets, and also for securing rights of way connecting same with the previously described property at the west end; and alleges that in the

condemnation proceedings the verdicts aggregated \$1,349,-347.66; and sets forth an agreement of the trustees alleged to be of "doubtful validity," to omit from condemnation certain property included in the condemnation resolution of January 24, 1903, which omission made said verdicts aggregated less than otherwise would have been the case; and further alleges in detail the probable expense to be incurred in perfecting the rights of way connecting this and the west end properties, which expense, together with the cost of the condemnation proceedings, leaves nothing for the construction of round-houses, repair-works, machine-shops, or like necessary structures within the city limits for which it is alleged the trustees have made no provision.

The petition then alleges that this suit is brought upon the request of E. A. Ferguson, a tax-payer; that the lessee company by reason of the supplemental agreement and extension of lease, providing for the approval of its location, etc., of all lands and structures acquired and made by the trustees, claims by virtue of said agreement some interest in the proceeds of sales of the bonds and the expenditures of the same.

Upon this status of fact it is claimed that the expenditures made and to be made from the bond sales, as indicated, are and will be a breach of trust and a misapplication of the funds of the city within the control of the trustees; and this court is asked to perpetually enjoin the trustees from expending any of said proceeds in the purchase or appropriation of said property, or the connecting rights of way described.

Upon a prior special demurrer, the several trustees, sued as individual defendants, were dismissed in their individual capacity from the case. The lessee company answers, denying that by the acquisition of the lands in the west end of the city described, all the necessary terminal facilities had been provided and located; avers that the northern terminus of the road is the city of Cincinnati, and that the tracks leading to the local terminals within said city are not branch lines; and setting forth the agreement of modification and extension of the lease and the proceedings of the trustees in con-

demning the property between Vine and Plum streets; it avers its own written request for and consent to the location and acquisition of the same, and its like approval of the omission of the specified property from the condemnation proceedings; and further that the property acquired will provide sufficient terminal facilities.

The trustees demur to the petition and the city demurs to the answer of the lessee company, and the consideration of the entire case is reserved to the general term, upon what are thus questions of law, inasmuch as the demurrers admit only facts well pleaded and not conclusions of law.

The main question presented by the pleadings and argued to us at the hearing is, in brief: Whether the trustees, by their action heretofore in acquiring property and locating terminals and tracks in the vicinity of Mill Creek in the west end of Cincinnati, did so legally locate the terminals of and complete the Cincinnati Southern Railway as to exhaust their powers as to any further location of terminals? It is claimed that under the general power of the trustees to build a railway between the two cities, the incidental power of eminent domain ceased upon the completion of the road between, and the location and acquisition of terminals within said cities. The theory upon which this objection proceeds is, that the acts and declarations of the trustees with respect to the Mill creek property amount to a legal location of the Cincinnati terminals at said point; that the acquisition and filling of lands for the track-way north on McLean avenue constituted a virtual appropriation of all the lands lying between this line on the east and the B. & O. S. W. Railway on the west; and that the power of the trustees to provide further terminal facilities being thus exhausted, the act of 1898, providing funds, must be construed as limited to the improvement of this particular location, and not as authorizing the acquisition of new territory.

The act of 1898, and the contracts for the modification and extension of the lease, were before this court at the general term of 1902, upon objections to the act as unconstitutional, and to the contracts as invalid, an abuse of the corporate

powers of the city and in excess of the powers of the trustees.

The court found against all of these objections, and its action was subsequently affirmed by the Supreme Court on authority of *City of Cincinnati v. Taft*, 63 O. St., 141.

It is at least significant, that, while the precise question here under consideration was not there involved, the main facts upon which it rests were incidentally assumed, and no such objection as is now urged seems to have occurred to any one. Section 5 of the act of 1898 declares that:

"The said trustees shall expend the said fund in providing terminal facilities for said railway, and in making permanent betterments upon the line thereon," etc.

In the discussion of the contract made under this statute, this court, in its opinion in the case referred to, delivered by Judge Smith, said:

"It may well be surmised that the parties to this agreement found it impracticable to state these matters with greater particularity. They could not foresee the time required to *finally determine the location* most to be desired for the terminals nor the length of time required to *negotiate for the land needed*; nor if unsuccessful in securing it by negotiation, the length of time required to *acquire it by appropriation proceedings*.

"The purpose of having proper terminal facilities and permanent betterments is not the improvement of the appearance of the railway. It is a business purpose. It enables it more expeditiously to handle its traffic as well as a larger volume of the same. The terminals and betterments therefore increase the income of the lessees; and, as the amount the lessee is willing to obligate itself to pay must depend upon the income it hopes to make out of the railway, it necessarily follows that with proper terminal facilities and permanent betterments, a lessee might agree to pay a large rental, where without them it may be willing to pay only a much reduced rental, or perhaps not to enter upon a lease at all."

The proposition that the trustees exhausted their power as to acquiring terminals by the purchase of land and laying of tracks on and near McLean avenue in the west end, is untenable as it seems to us from every point of view.

So far as the argument rests upon views and intentions of the trustees in respect to their acquisition of the west end property—that the ultimate and sole terminals should be located thereon—we find no evidence of such intention in any of the resolutions of the board; and it can not reasonably be implied from any of their acts in the premises. The temporary character of the purposes to be subserved by such acquisition is sufficiently apparent from the declaration of the trustees cited to us, explanatory of the reasons for locating the Ohio river bridge opposite that point; which naturally, and for the time being at least, necessitated nearby shipping facilities in order to make the road practically operative at the earliest possible moment.

The claim made in the petition that the extension of the tracks upon McLean avenue virtually appropriated the territory west of the same to the B. & O. S. W. tracks, for the purpose of ultimate terminals, seems to us to have no stable foundation. To utilize it as such would require a fill over the entire territory to a depth (as stated in argument) of twenty-five to forty feet, at a cost practically prohibitive; and, moreover, would seriously handicap the road for all time by the remoteness of the location from the business and hotel districts of the city.

It seems much more reasonable to presume from the relation of this property to the vast manufacturing interests located and to be located in the Mill Creek valley, and to the various important connecting railways passing out of the city adjacent to the property acquired, an intention to secure the west end property as yard room for convenience of transfer and storage purposes in respect of interchanged traffic, as part perhaps, of the ultimate system, but assuredly not all, nor even the principal of its terminal facilities.

As to the power of the trustees to be exercised under the act in question, we can entertain no doubt. Considering the important character of the trust, it is not to be supposed

that it was ever intended by the Legislature to minimize and confine the powers of the trustees in the premises, but rather to amplify them to the full measure of the necessity; and certainly if it depended upon questions of mere statutory construction, we should feel constrained to apply the most liberal rules recognized by the practice of courts in such cases.

But in this case there is no necessity for resort to technical rules. We think the act of May 4, 1869, under which the resolution of the city council of Cincinnati was passed authorizing the construction of a railroad between Chattanooga and Cincinnati, gave to the trustees, by necessary implication, the power to build not only *to*, but *into* these cities, and to provide such terminal facilities as in their judgment would best subserve the main purpose in view, namely, to fully build and complete a railroad, efficient in every respect, for traffic between Cincinnati and the south. It is therefore not to be supposed that their power was intended to be territorially limited to, so as to reach the corporate boundaries of the terminal cities only, but that they could locate terminals at any point within such boundaries; and if it were so, the subsequent act, authorizing them to "provide terminal facilities," without further specification, must be construed as confiding to them ample power to be exercised according to their sound discretion.

Nor can we perceive, in the acquisition of the property between Vine and Plum streets, any hint or suggestion of an abuse of such power. On the contrary, taking into view the general railroad situation as it exists in the city of Cincinnati, as a fact of general public knowledge—the topographical features practically compelling the use of the "bottoms" adjacent to the river for the heavy business of the city and for terminals of railroads entering the city at a corresponding level through the radial valleys—it seems to us a justifiable assumption and quite within the discretionary power of the trustees, to hold that the ultimate terminals of the Cincinnati Southern Railway should be located in that general locality. This is an obvious deduction also from the facts of the situation showing the concentration of

the terminals of other leading railways in that section of the city. These facts fairly, as we think, determine the necessity of such location of terminals for the Cincinnati Southern Railroad, as a means of enabling it to compete on equal terms for the carrying business it was built to transact.

The principle involved was settled by the Supreme Court of Ohio in the case of *The Toledo & Wabash Railway Co. v. Daniels et al*, 16 O. St., 390, with respect to private railway corporations. The court adopt the opinion of the Supreme Court of Illinois in a similar case, in part, as follows:

"One of these views is that the road itself having been actually completed and running, the power to condemn land either for track of the road or for depots or other appendages is exhausted. In this view we can not concur.

"It would indeed be a disastrous rule to hold that a railroad company must in the first instance acquire all the grounds it will ever need for its own convenience or the public accommodation. * * * We can not suppose it was the intention of the Legislature to oblige the company to acquire all the land in the first instance which in any event it should ever acquire, to do the largest amount of business it may ever attain. The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility.

"*'Prima facie'* (say our own Supreme Court), 'power to do any act, is to do it in such manner and at such time as is usual, convenient and reasonable—in such way as prudent men manage their own concerns' " (*Id.*).

If, therefore, private corporations organized for building railroads may exercise the power of eminent domain as and when the necessity arises, as a continuing power to accommodate the growth and development of the road, *a fortiori* the Legislature in providing for the building of a great public highway such as that in question, for the public benefit, intended to confer upon the trustees charged with the execution of the work a no less ample power.

The further objection urged at the hearing, namely: that

in agreeing to omit a certain portion of the property covered by their declaratory resolution and by their petition in the condemnation proceeding the trustees vitiated and rendered void the entire proceeding, does not seem to us well taken.

If, as intimated in the petition, the agreement so to do was invalid, then certainly the proceedings are not vitiated thereby; moreover, as the terms of the agreement are not set forth, *non constat* it may have given to the trustees rights even more beneficial to the main purpose than would have resulted from the condemnation; and one fact certainly is significant, namely: that the trustees are saved about a quarter of a million dollars in expenditure; and there is no allegation showing that the main purpose of the condemnation is in any way impaired. We must presume, therefore, that the omission was made for some beneficial purpose.

The objection is based, as a matter of law, upon the decision of our Supreme Court in *Grant v. The Village of Hyde Park*, 67 O. St., 166. As we understand the effect of this decision, it protects the right and interest of a property owner directly involved in the condemnation proceeding in the public work as a whole. The suit was based upon the attempt of the village council as a legislative body to change its plan and purpose with respect to the work in hand, after the institution of condemnation proceedings, without notice to the property owners whose interests were involved in the carrying out of the original plan.

Land was being condemned for street purposes upon certain plans and specifications establishing the grade, contour, etc., of a public street. The change made was a violation of the statutory mode prescribed for making such appropriation, and materially changed the character of the case itself as to evidence relating to the effect of a different grade upon the land abutting, and upon the character, usefulness and expense of the road itself.

In such a case a public street must be regarded as a unit, and it is obvious that the rights of every abutting owner are involved in changes affecting any part (*Peck's Mun. Laws of Ohio*, pp. 133, 134).

Moreover, with respect to such proceedings relating to

streets and like public works, the council is a legislative body employed in a governmental capacity; while in this case the trustees, although exercising powers of a public nature, act, nevertheless, in a proprietary capacity just as any individual might do—for the railway is not a public highway in the sense of a street, but an avenue and means of traffic utilized for gain, and not open to the public for free use. See *Cincinnati v. Cameron*, 33 O. St., 336; *Cleveland v. Construction Co.*, 67 O. St., 197; *Oliver v. City of Worcester*, 102 Mass., 489.

The Hyde Park case does not apply to the present consideration for still other reasons. In the case at bar the rights of the individual owners are not in any way connected. Each stands in an exclusive and individual relation to the purposes of the condemnation. The taking of the land of each exhausts his interest in the subject-matter. There remains no continuing interest as in the case of a street which passes over or adjacent to his land and which he is entitled to use in the future.

But again: under the acts authorizing, and the statutes regulating, condemnation proceedings by the trustees, they may abandon as to any owner, being liable only for costs, expenses and attorneys' fees (42 O. S., 239). If they may abandon even after verdict, there appears to be no good reason why they may not do so before unnecessary expenses are incurred, if for any proper reason they see fit so to do; and in the present case no abuse of their discretionary power is charged. In fact, the power of entry and appropriation given under Revised Statutes, Section 3281, seems to give as full power in the premises by fair intendment, as could be exercised by any railway corporation, even if it were not deducible from other conditions referred to; and the principle of the right to abandon the condemnation proceedings, as to all or part of lands, by railway companies, is now well settled.

The last objection suggested, namely: as to the agreement whereby the selection of terminal sites, etc., was to be approved by the lessee company, is one that is substantially answered by this court in *Cincinnati v. Ferguson*,

12 O. D., 439. The agreement in this case, as in that, was carefully worded so as to yield only so far as they legally might—which, in fact, is no surrender at all. As there is no conflict between the parties concerned, based upon any assertion of right in the premises, the objection need not be considered further. As to the allegation that funds have not been reserved to build round-houses, etc., in the city of Cincinnati, it is obvious that conditions might require their location elsewhere on the line of the road. Such an objection pertaining to a detail of the practical operation of the road seems to us without force in the present consideration.

Considering the whole case, as presented, we think the demurrer of the trustees should be sustained; and as the contention involves only questions of law, the petition should be dismissed.

Demurrer of trustees sustained and petition dismissed.

Chas. J. Hunt, for plaintiff.

John R. Sayler, for trustees.

Edward Colston, for C. N. O. & T. P. Ry. Co.

BREUER v. FRANK.*

CHARGE TO JURY ON SECOND TRIAL.

Gentlemen of the Jury:

This case is about to be submitted to you for your determination.

We will go back to the pleadings which state the case and which define the exact issues to be determined.

The petition filed in the case by Mr. Frank, charges that the defendant owned and operated the Franklin Building, at the southwest corner of Third and Plum streets, on the 12th of September, 1901; that he, the plaintiff, was

* Affirmed by Supreme Court, 74 O. St. —.

then employed by the American Suspender Company, who had their office and factory on an upper floor of said building, and that the mode of access thereto was by a hydraulic elevator operated by defendant's servants; that on said date plaintiff was seeking access to said factory; that the defendant wrongfully permitted the door of said elevator shaft to remain open; that no person was guarding such opening to warn him of danger; that the elevator had of its own motion ascended to an upper floor and was not at the landing or entrance, by reason of its being out of repair; and that plaintiff walked into said opening, and, through the negligence of the defendant, and without negligence on his part, was precipitated to the cellar, causing him to suffer injury and pain, and that he is entitled by reason of such injury to the sum of \$25,000. He says that the elevator had been a long time out of repair, to such an extent that when brought to a standstill it would ascend of its own motion, and that the attention of the owner, the defendant, had been repeatedly called to the fact; and that the defendant on this certain day had knowledge of its defective condition, yet that the defendant negligently, and in violation of his duties to the plaintiff, permitted the elevator to remain in this defective condition, and by consequence thereof, and by its ascending, the injury resulted.

He then describes his injuries. I need not take time for that here. He also describes the loss which accrued to him, and claims damages in the sum of \$25,000.

In an amendment to this petition he further says not only was the elevator out of repair, but that, through the negligence and carelessness of the defendant's servants and employes in charge of the elevator it was allowed to creep up from its landing, as described.

Now the defendant files an answer in which he admits the ownership of the building and the tenancy of the American Suspender Company, and he admits proof of the employment of the plaintiff, Mr. Frank. He denies that the usual and proper way of access to the factory of the American Suspender Company on the third floor was by the elevator, but claims it was by the stairway, and sets forth a

clause in the lease that the passenger elevator should not be used by the employes.

He denies that he permitted the door of the elevator shaft to remain open. He denies that no person was in attendance to warn the plaintiff of danger, and says that the plaintiff came rushing into the building, passed the defendant's servant, pushed the door open and carelessly and negligently stepped into the opening. He denies that the elevator was out of repair, or that he had been warned of any defect prior to the time of the accident, and denies all the other statements of the petition.

The plaintiff files a reply in which he says he was not a party to the lease referred to in answer, nor had he any knowledge of the existence of said lease or the contents thereof. He denies that he came rushing into the building and pushed open the door of the elevator; on the contrary, he avers that he came walking into the building, and that as he approached the door leading to the elevator, the operator, who was sitting on a chair close by, arose and followed him to the door to take him to the third floor; that the door was wide open, the elevator was not at the landing, but through the fault and carelessness of the defendant, his servants and employes, the elevator had been allowed to creep up to one of the upper floors; that the hallway was dark and ill-lighted, so that when plaintiff approached the doorway he did not see the elevator was not at the landing, although he was looking straight ahead, and without any negligence on his part, he was precipitated. This constitutes the declarations of the parties to the case.

In order to establish his right to a verdict in his favor, the plaintiff must satisfy you by a preponderance of the testimony that the accident producing these injuries was the result of negligence on the part of the defendant, in respect of the duty which the defendant owed to him.

Now this word "negligence," which you have heard so commonly used in this case, means in law, as follows: Negligence is failure to render that care required by law to be exercised in certain relations between parties where a duty is involved. For example: those who carry passengers for

hire—railroad companies, omnibus companies, steamboat companies, for instance,—are required to use care in the operation of their vehicles of travel to safely transport their passengers.

A manufacturer is charged with the duty of providing reasonably safe and suitable machinery and appliances to be used by those who work for him.

So the owner of a tenement building, or hotel, or office building, who maintains and operates elevators for the use of tenants and their customers, or guests, and their friends, or for the public who may have business with these people, likewise owes a duty to those who may properly use the elevators to provide reasonably safe appliances and maintain and operate them in a reasonably safe manner through the agents and servants he employs for that purpose. In all such cases, and many others, that no doubt will occur to you, where agencies of any kind may be employed, that might be dangerous to those who may properly make use of them, the obligation of care is imposed upon those who do maintain and operate them, to the end that injury may be avoided; and a failure to exercise the care the law imposes, is what is called in law, "negligence," wherever such failure to use such care, results in injury to others to whom the duty or care is owing.

The care which the law requires to be exercised is that degree of care which persons of ordinary prudence are accustomed to use under the same or similar circumstances, having due regard to the rights of others, and to the objects to be accomplished; it is such care—in brief—as prudent persons are accustomed to exercise under the peculiar circumstances of the case, as it is presented. The circumstances under which care is required to be exercised, therefore, are to be regarded by you in determining whether ordinary care has been exercised by either, or both the parties, where an injury has occurred.

I may say right here, that the fact that a person injured may have a defect as of hearing or of sight, does not change the general rule. It simply imposes upon the person so afflicted, the duty of exercising such degree of care

as is ordinarily used by prudent persons having such an infirmity.

Now, the plaintiff in this case charges the defendant with negligence, or want of due care, in maintaining the elevator in his building, and the burden of proof is upon the plaintiff to show you his contention is well taken, because the law presumes that persons upon whom the duty of care is thrown, do exercise that care. But negligence can not be shown directly, like the happening of an event that can be seen, and therefore testified to, by witnesses who actually saw the event. It is always an inference from facts proved.

The plaintiff must, therefore, present to you such facts connected with the accident as will justify you in believing his injury was due to the negligence of the defendant.

But the duty of care is not one-sided. Those who use the agencies which may produce injury, owe a corresponding duty of care to properly use them, so as to avoid being injured. In this case the defendant, Breuer, claims that plaintiff failed to exercise the care for his own safety that it was his duty to exercise, and says he came rushing into the elevator, ignoring the operator, pushed open the door, and carelessly and negligently stepped into the shaft. The same presumption of law operates in favor of the plaintiff as in favor of the defendant, upon the charge of negligence against him, and it puts the burden of proof upon the defendant to prove his allegations, unless the plaintiff's own testimony indicated negligence on his own part.

So that, if upon the full evidence of the case, it appears that the injury was caused directly by the want of ordinary care by both parties, there can be no recovery, for the law can not apportion between them.

The same result follows, if upon the whole evidence it appears there was no negligence on the part of defendant, but the injury was caused exclusively by the negligence of the plaintiff. If, upon the whole evidence, you find, under the circumstances of the case, the plaintiff exercised the care of an ordinarily prudent person, situated as he was at that time, and this injury was due wholly to the negli-

gence of the defendant, or his agents or employes, then your verdict will be for the plaintiff.

Now these are the matters to be determined by you in this case, and the facts are to be considered and ascertained by you, under your oath to render a true verdict upon the law and the evidence.

This means, that in considering the evidence, you are to apply the rules of law which the statute makes it my duty to state to you for your information and guidance. That I will endeavor to do briefly.

In determining questions of fact, you are the exclusive judges. Wherever there is a disputed fact in the case, necessary to be ascertained, that is for you to do. In doing that you are to be governed by a preponderance of the evidence, that is, the greater weight of the evidence one way or the other—that is, when a fact is in dispute—and it does not mean mere quantity, but means the quality of the evidence—the convincing power of the testimony—that should govern you in reaching a conclusion.

The word “preponderance” is used in reference to the balance or ordinary beam scale in which the weight one side or the other preponderates. In determining these disputed questions of fact, you should consider all the witnesses’ statements, the bearing of the witnesses, their manner of giving testimony and the interest of the persons who testify; and you should compare and weigh the testimony in the light of all the facts and circumstances, impartially, fearlessly and with the sole desire to ascertain the truth.

There are certain facts in this case not disputed.

The building in question was occupied by tenants for manufacturing purposes, and it was a large building with a number of stories. The tenants had employes and others who went in and out of the building from time to time, as was natural, and as they had a right to do. In no sense whatever were the employes or the customers, or those having business with these tenants, trespassers in the building. They had a perfect right in the building. There was a main entrance to the entire building. and in said entrance or hallway were stairs, and a passenger elevator

which was operated by the owner, the defendant, Charles C. Breuer, by power, which he supplied, and it was under the care and supervision of an operator employed by him for the purpose. There was in the entrance in the hallway a sign reading "Take the elevator," and at or near the elevator another sign, "Ring the bell"—or words to that effect—indicating the mode of summoning the operator if he should not be on hand, if one wished to take the elevator.

These facts, which are not disputed, constituted an invitation to use the elevator to all who might enter said building for any legitimate purpose of business connected with the tenants who occupied the building, except those to whom a distinct notice was given to the contrary, and not withdrawn subsequently by direct notice or by a waiver of the prohibition by the permissive use of the elevator.

As a matter of law I charge you that an agreement or stipulation in the lease between Breuer and the tenants, prohibiting the use of the elevator to employes, in which the lessee covenanted that the passenger elevator should not be used by their employes, would not bind the employes, nor would it relieve Mr. Breuer from his obligation of care toward them in respect of a permissive use of the elevator, unless knowledge of the prohibition was brought home to them individually, and not then if the circumstances,—such as the absence of any sign to this effect and the continued use of the elevator with the knowledge of Mr. Breuer or his employes without objection,—justify the belief he had waived the prohibition.

In this case the answer does not claim that this prohibition was communicated to the employes.

Now, as to all those who were permitted to use the elevator, Mr. Breuer was under an obligation to use ordinary care to provide reasonably safe elevator appliances and approaches thereto, and to maintain them in a reasonably safe condition. He was also under the same obligation to provide competent and careful operators. He was not an insurer of the safety of the apparatus or of the persons who might use it, but he was required by law to exercise ordinary care, such as an ordinarily careful and prudent per-

son is accustomed to exercise under the circumstances; that is, he must exercise it through those whom he employs for these purposes; their care was his care and their neglect his neglect. So, on the other hand, those to whom he thus permitted the use of the elevator were bound to exercise ordinary care, to properly use these appliances and avoid danger therefrom.

Now, one rightfully using an elevator has a right to presume the presence of a number of conditions.

You understand, that the word "presume" means—"has a right to take for granted," practically—to assume certain things existed—has a right to presume the presence of a number of conditions. He may rightfully assume the elevator is a suitable and fit instrument to transport him from one part of the building to another, and he might assume with equal propriety the elevator was in good repair, and able to do that for which it was intended.

The proprietor of a building is not required by law to have the most modern elevator, the best equipped elevator, with all modern appliances connected. He discharges his full duty to the one using the elevator if he keeps the same in good repair, and has it ready to accomplish the purposes for which it was intended, that of a hoist or lift.

In law the proprietor of a building is charged with the duty of employing a suitable person to operate an elevator: not the most skillful person, but one who understands an elevator and knows how to operate it, in such a manner as to safely carry those who enter the same, and one who carefully guards the approaches of the elevator to avoid danger to those who take it.

What is ordinary care in such a case on the part of one about to use an elevator? An elevator in a building for the carriage of persons is not supposed to be a place of danger, to approach with great caution. One who has a right to ride in an elevator is not required, if there is nothing in the surrounding circumstances to put him in anticipation of danger, to make full, complete and attentive observations when he is about to enter an elevator in the ordinary way. If he finds the door to the cab open, he is at

liberty to assume its presence—the presence of the cab at that place—and to rely to some extent upon its being there. If the door leading to the cab were wholly closed, or were partly closed, to such an extent he could not pass through, he would not be free from negligence if he voluntarily opened it. The jury should therefore take careful consideration of all the surrounding circumstances, the objects, the persons, the time, place, conditions, just as they presented themselves to the plaintiff at the time—as he found them—and determine upon these facts by a preponderance of the evidence, whether his act was that of a person of ordinary prudence.

Now, mere negligence will not justify a recovery; the negligent act must have produced the injury, must have been the proximate cause of the injury, and by “proximate cause” is meant that cause which directly produced the injury. The term “proximate” does not necessarily mean the cause nearest in point of time or distance, but does mean that cause without the existence of which the injury could not have occurred. Injury alone would not justify a verdict for the plaintiff. There must exist both injury and wrong, and it is for the plaintiff to establish by a preponderance of the testimony the fact that the proximate cause of the accident was the negligence of the defendant.

If the plaintiff was rightfully entitled to the use of the elevator, then the defendant owed to the plaintiff the duty of having the elevator so constructed and operated as that one could use it with safety, and if you should find from the testimony, that the elevator was in good condition at the time of the accident—in good repair, not out of repair; that the conduct of the operator was, in all respects, what it should have been; that there was no negligence anywhere on the part of the defendant or his employees; that the accident was caused entirely by the want of due care on the part of the plaintiff, then, of course, the plaintiff can not recover. But if you should find on the other hand this elevator was out of order and by reason of that fact it crept up to the upper floor, thereby leaving this pit into which a man might stumble, and that the door leading thereto was

open; that the operator, whose duty it was to guard that opening, was right there; that the man passed him, then it is for you to say whether all these conditions were not such as to excuse any negligence there might have been on his part; and if you find such to be the fact and the injury was caused by the negligence of the defendant, plaintiff is entitled to recover. If you should find from the testimony the plaintiff is entitled to recover then comes the question of his damages. You have a right to take into consideration all the reasonable expenses made necessary by this injury, and to consider what sum would compensate—make good, make the man whole, so far as money can make him whole—for the injury he suffered. You would have a right to consider and find from the testimony what amount was paid to the physician or surgeon, what amount was paid to the nurse who cared for him while being restored to health, the cost of medicine and other incidental expenses. You are to determine whether the injury was of a permanent or temporary nature, and what effect this may have upon the capacity of the plaintiff in earning a livelihood. You have a right to take into consideration the business in which he was engaged, the nature and demands of it, in measuring the extent to which he was injured, and ascertain how much his earning capacity has been reduced, whether the same is likely to be permanently reduced. You may take into consideration his age, the pain and suffering he has endured, and that which he is still likely to suffer, if any, as a result of his injury. Also take into consideration what would be a just and fair compensation to him for the pain and suffering he endured while in the process of restoration. Taking all these things together and considering the matter carefully, you are to determine what, in your best judgment, is a fair, reasonable and just compensation to him, all things considered.

Gentlemen of the jury, it is our desire on all sides to avoid all possible misunderstanding or error which may give the upper courts any reason to set aside this trial. Certain points have been called to my attention by counsel

in which possibly I might not have expressed myself with such clearness that the jury got clear ideas.

Among the undisputed facts I have assumed and stated to you that, among others, there was a sign in the hall as one entered this building which read, "Take the elevator." That was my understanding from the testimony, but it is suggested there is testimony—if so, it escaped me—that it simply read "*to* the elevator," instead of "*take*." It is possible I might have misunderstood the witness, but you will be the judge of that.

Now, on another point concerning the duty of the owner of a building or any one else who undertakes to operate these agencies which may be dangerous. I stated it was the duty of the owner or the one who undertook to operate these things, through servants or agents, to provide people who are competent and skillful, and so forth. Perhaps a more accurate statement of the law would be that it is the duty of such person to use ordinary care to provide. This duty of ordinary care is one that runs through everything, and it is to be applied in all such cases. Men are held to reasonable care and duty to perform their duties.

It is suggested, as there is no testimony respecting the cost of medicines or drugs used, that perhaps that might be eliminated. If so, you can disregard that as an element of damage.

Gentlemen, you will find two blank forms of verdict, one for plaintiff and one for defendant. Whichever way you find, the foreman will sign the verdict, to which you should all agree.

If you find for the plaintiff then consider the question of damages, and simply state the total amount you find represents the damage.

GEORGE W. SEIFRIED V. JOHN C. MAYCOX.

1. An employe who is under either an express contract, or a contract implied from the confidential relations existing between him and his employer, not to disclose trade secrets, has no right, after leaving the employment, to disclose or use the same for his own benefit, or to the injury of his former employer. Injunction will lie to restrain such disclosure or use.
2. An employe may, after leaving his employer's service, lawfully engage in the same line of business as, and in competition with, the latter, and to this end may avail himself of the general knowledge and practice he has acquired while engaged in his former employer's service, which includes the right to canvass for the latter's customers, the names of whom he has learned *bona fide* in the ordinary course of experience in the business; no property rights of the employer are thereby infringed. But names of customers collected by the employer, or by such employe for him, by special effort and at great expense, which is not such mere information as is supplied by, or can be obtained from, sources open to the public and which are guarded by the employer from competition as far as possible, all of which such employe necessarily obtained by reason of his employment, can not be used by such employe for his own benefit, or to the disadvantage of his former employer. Such special information is the property of the employer; and while he can not be protected even with respect to these customers as against the ordinary competition of such employe, yet when the latter becomes possessed of his knowledge by virtue of his confidential relations to his employer, and, after leaving his employ, makes use thereof for his own benefit to the injury of his former employer, he is guilty of unfair and unconscionable competition which equity will enjoin. Hence, where it appears that an employe of a gold and silver refiner was, during his eight or nine years of employment, sent by his employer on extended trips throughout the country to see manufacturing jewelers, jobbers, pawnbrokers, bookbinders, etc., to ascertain their needs as to new supplies, and their custom as to disposing of their refuse products of gold, on the basis of which knowledge so obtained his subsequent trips were so timed as to fit the respective customs in this regard; that these facts were in some instances already known to the employer, but in others were ascertained by the employe as part of his duty owing to his employer; that The information so obtained was such that it could not be ascertained from directories or similar sources of public information;

that he did not, in all cases, report the names thus ascertained to the employer, but that the names reported were entered on the employer's books; in such case, equity will perpetually enjoin such employe from using the names of customers so obtained for his own benefit, or to the disadvantage of his former employer. Whether the information was carried away in memory, or written down, is immaterial.

3. It is not a sufficient basis for affirmative denials in pleadings, for the pleader to affirm ignorance of the matter denied, on the witness stand.

HOSEA, J.

The amended petition in this case alleges that the plaintiff, being engaged in the business of gold and silver refining in Cincinnati, manufactures certain alloys of metals for the use of manufacturing jewelers and others, and has devised certain formulae for the production of gold plate and gold solder for dental use, which formulae differ from those used by others in the business, and are trade secrets of great value to him, and have always been carefully guarded. Also, that in his business relations with customers he has acquired special knowledge as to the character of the refined metal they require and that which they may have to sell; and of the times in each year when they make their sales; and other facts relating thereto, depending on the character of the business of each customer; and that the names and addresses of such customers, together with the said facts, are contained in his books of account, and have been gathered at great expense, and are also trade secrets which he has carefully guarded. It is further alleged that the defendant, who had been for eight or nine years in his employ as clerk and traveling salesman, left his employ a few days prior to the filing of the petition; that while in said employ he committed to memory or copied from plaintiff's books the names and addresses and other facts relating to plaintiff's customers, and also copied from plaintiff's private memoranda the formulae aforesaid in violation of his confidential relations with plaintiff, and is about to establish business of the same character on his own account, or with other persons, and

intends and threatens to use therein said formulae and list of plaintiff's customers and the information recorded therewith, to the irreparable injury of plaintiff, for which he has no adequate remedy at law.

He asks, therefore, an injunction, temporary and permanent, to prevent the threatened invasion of his rights, and mandatory to compel the defendant to deliver up all copies so made by defendant, and for all other proper relief.

A temporary order was granted, as of course, and the defendant having meantime moved to dissolve, it was agreed by parties that answer should be filed and the cause brought on for final hearing upon the merits.

The answer admits the defendant's employment in the service of plaintiff, and that defendant left said employment and intends to engage in similar business on his own account; but denies that plaintiff has devised and invented any formulae for the preparation of gold and gold solder for use as alleged in the petition, and denies that the formulae therefor used by plaintiff are different from those used by others in the business or are trade secrets, but alleges that the formulae used by plaintiff, of which defendant has any knowledge, have been in general use for many years. Defendant denies ever copying any of plaintiff's formulae from plaintiff's books or the names and addresses, or other facts relating to plaintiff's customers; and denies each and every other allegation not specifically admitted.

The testimony shows that the defendant solicited a workman in plaintiff's employ to leave and join defendant in a competing business, declaring that he had copies of all plaintiff's formulae and books and could open the eyes of the plaintiff's customers. He referred particularly to a little book carried by plaintiff in his pocket, saying that he had copies of every formula in it; that he had copies of everything in plaintiff's office—all the formulae, addresses and books. These statements, in substance, were made to the party addressed, openly, in the presence of his wife and sister-in-law, who testified in corroboration.

The defendant admits the interview, and says he opened

it by stating that he understood that the plaintiff intended to place a man over Eith (the party addressed) and he did not know whether Eith would like it; that he asked Eith to join him in business, stating that he (defendant) knew all the customers, and showed Eith that he was thoroughly acquainted; that he knew all the different formulae for alloying the gold; knew the office work; "knew what the customers wanted and could handle them."

He denies having a copy of anything in plaintiff's book (referring to the pocket memorandum book); denies having copies of the formulae; denies knowledge of the formulae used by the plaintiff; and admits that he exaggerated in telling Eith that he knew all the formulae for alloying the gold.

The testimony of the defendant does not correspond with the allegations of the answer. It is not a sufficient basis for affirmative denials in pleading to affirm ignorance on the stand of the subject-matter denied; however, the admissions concerning the details of the interview with Eith and the members of his family, and other statements of the defendant on the stand indicate a want of moral perception of the obligations inseparable from confidential business relations that does not commend itself to the favorable consideration of a court of equity.

The testimony shows that the formulae for gold plate and gold solder for dental use were upon paper slips kept in a private pocketbook by plaintiff and only taken out when weighing and assembling the materials for the alloys, used by himself only and replaced after such use.

These formulae were by consent arrangement exhibited to opposite counsel under agreement of secrecy, and a copy deposited with the court.

Testimony of several dentists and local manufacturers was adduced, showing the state of the art; and on this point I find that the novelty of the combinations indicated is fully and satisfactorily established, and that the combinations of materials and alloys as shown in the formulae were devised and produced by plaintiff as the result of his experience and skill, through experiments undertaken to

the end of producing products embodying certain desirable qualities differing from the products of other manufacturers; and that they were in fact regarded and used by him as trade secrets in his business, and that this fact was fully known to the defendant.

The law governing this branch of the case is well settled. A case decided by the Court of Errors and Appeals of New Jersey in 1903, namely, *Stone v. Goss*, 55 Atl. Rep. 736, is perhaps the most exhaustive and satisfactory of recent cases in this country and contains a full review of the English and American authorities, establishing the principle, stated by the court as follows:

"Employees of one having a trade secret, who are under an express contract, or a contract implied from their confidential relations to their employer, not to disclose that secret, will be enjoined from divulging the same to the injury of their employer, whether before or after they have left his employ; and that other persons who induce the employe to disclose the secret, knowing of his contract not to disclose the same, or knowing that this disclosure is in violation of the confidence reposed in him by his employer, will be enjoined from making any use of the information so obtained although they might have reached the same result independently by their own experiments or efforts."

The disclosure of the secret to the court, made necessary by the ordinary exigencies of a trial, was dealt with in that case as I have dealt with it here. The same difficulty arose many years ago in a case before Lord Eldon (*Newbury v. James*, 2 Meriv., 446, 451), and this testimony was taken, *in camera*, under the injunction of secrecy upon counsel as officers of the court, as has been done in many cases since Lord Eldon's time.

The leading American cases in support of *Stone v. Goss*, *supra*, are *Peabody v. Norfolk*, 98 Mass., 452 (followed in 100 Mass., 75); *Florence Sewing Mach. Co. v. Sewing Mach. Co.*, 110 Mass., 1, 11; *Ryalls v. Mechanics Mills*, 150 Mass., 190, 191 (22 N. E. Rep., 766; 5 L. R. A., 667);

Thum Co. v. Tloczynski, 114 Mich., 149 (72 N. W. Rep., 140; 68 Am. St. Rep., 469); *Westervelt v. Paper & Supply Co.*, 154 Ind., 673 (57 N. E. Rep., 552); *Salomon v. Hertz*, 40 N. J. Eq., 400 (2 Atl. Rep., 379); *Tabor v. Hoffman*, 118 N. Y., 30 (23 N. E. Rep., 12; 16 Am. St. Rep., 740); and the difference between mere skill in manipulation (as urged in argument in this case) and a process of manufacture which may properly constitute a trade secret, is well exemplified, as against the defendant's contention, in *Carnegie Steel Co. v. Iron Co.*, 185 U. S., 403 (22 Sup. Ct. Rep., 698; 46 L. Ed., 968).

The question of confidential relationship, as deducible in the present case, from the nature of the employment, is settled upon principle well expressed by Kekewitch, J. (1892), in *Merryweather v. Moore*, 61 L. J. Ch., 505, as follows:

"Where the relation is of pure service, unmixed with any element of apprenticeship, the servant, if his employment necessarily invests him with special information which can be profitably used, has no right, after he has quitted service, to use that information for his own benefit."

So far, therefore, as concerns the power and duty of the court to enjoin the disclosure and use by the defendant of the trade secrets of the plaintiff embodied in the formulae for dental gold and gold solder placed in the hands of the court, the case seems clear and beyond question.

As to the branch of the case relating to the customers, there is more difficulty, arising in part from the state of the law, and in part from the nature of the evidence adduced in the case.

It is shown that the defendant, Maycox, was sent out on extended trips to see manufacturing jewelers, jobbers, pawn-brokers, bookbinders, etc., to ascertain their needs as to new supplies and their customs as to the disposition of their refuse product of gold; and, on the basis of the knowledge thus gained, his subsequent trips were so timed as to fit their customs in this regard.

The question is, whether the knowledge thus gained as

to the sources and general character of supply material, is the general knowledge appertaining to the business, or is special in the sense of establishing special relations with this particular business; and (2) whether, if of the latter character, it has been put into such concrete form as to constitute (as in the case of trade formulae) a tangible property right whose invasion a court of equity can enjoin.

This question is elaborately considered, upon the earlier English authorities, in *Robb v. Green*, 2 Q. B. Div., 1 (1895), wherein the defendant, being employed as manager of plaintiff's business, left the employ and set up in a similar business on his own account, and had during his service copied from his master's book of orders the names and addresses of customers, to facilitate his own solicitations, and it was claimed that all the defendant did was justified in law. Hawkins, J., says:

"As to the third contention" (namely, that, as the obligation of defendant to refrain from such acts was not made part of the written contract of service, it could not be implied), "I have a very decided opinion, that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant, that he shall perform his duty especially in these essential respects, namely: that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service and that he shall by all reasonable means in his power protect his master's interests in respect to matters confided to him in the course of his service. It would be monstrous to suppose that a servant should be absolved from the observance of these essential elements to good service, unless they were in terms especially provided for in the contract."

The court then review at length many earlier cases including that of *Irish v. Irish*, 40 Ch. Div., 49, cited by the defendant here, which he distinguishes as not involving the element of designedly preparing the way for "soliciting the customers of his master by breaches of confidence during

his service," and shows by the weight of the English authority the principle of decision to be this: That wherever concrete act is shown during service, designedly to enable the servant to carry away and utilize the information as to customers, etc., that is the property of the master, in the sense that it has been specially gathered, and is not mere information that is supplied by sources open to the public (such as trade directories and the like), the servant may be restrained.

It is said elsewhere in the opinion, that, having left his master, he may lawfully set up in the same line of business and may canvass for his late master's customers, whose names he has learned, *bona fide*, accidentally—which can mean only that general knowledge which any one might obtain in the ordinary course of experience in the business. This is expressed more clearly by Bowen, L. J., in *Helmore v. Smith*, 35 Ch. Div., 449, as follows:

"If the acts complained of merely amounted to such fair competition as the business would be liable to experience in the ordinary course they would be unobjectionable."

But, as said by Hawkins, J., in *Robb v. Green*, *supra*:

"The collection together of these names and addresses (*i. e.*, of customers) in the order book was the property of the plaintiff. * * * By making a copy of the order book, defendant was able to canvass at once each of his master's customers without trouble or expense."

And again, in substance, it is said, that not only is his act reprehensible, but it is so, even if the information was carried away in memory and written down elsewhere. "The information," says the court, "is the property of the employer. The mere property in the paper is nothing."

The principle established in these cases is not essentially different from that governing trade secrets. There is a certain amount of general knowledge and general practice in relation to every business which is common, and in which a proprietor can have no property right. Indeed, in

many cases there may be nothing more; and any clerk or employe may avail himself of this with entire freedom when he enters the field in competition. But in others, there is more or less matter of a special nature, gathered, it may be, at great expense, and by special effort, which is guarded as far as possible from competitors. In this class, fall not only secret processes of manufacture, but any special facts in relation to customers, or of a character not generally known or easily ascertainable, which, being ascertained in the course of dealing, are of special advantage to the business and constitute a valuable element of the good will.

A dealer or manufacturer can not be protected, as to the first, against ordinary competition; but as against those who become possessed of special knowledge by virtue of the confidential relations of employment, equity will interfere by its preventive action to forestall a competition that is unfair and unconscionable.

The testimony here, while not in all respects as full and clear as might be desired, shows, nevertheless, that some of the sources of supply of raw material are shops of manufacturers, such as manufacturing jewelers, mirror makers, bookbinders, etc., who accumulate refuse gold, and at certain times, according to their individual circumstances, collect and dispose of it. The defendant has testified to this, and also to the fact that these persons and the facts concerning their business were in some instances already known to his employer, and in other cases ascertained by himself as part of his duty while in the plaintiff's service and under his pay. He also makes it clear that this information couldn't be ascertained from directories or similar sources of public information. He did not in all cases report the names thus ascertained to his employer; but, so far as this was done, the names and addresses were on the books of the business. He also admitted that he knew all the customers, and gives this as a reason why it was not necessary for him to copy the information from the books, and denies having done so.

The names and addresses so entered upon the books,

whether procured by the plaintiff or by the defendant for the plaintiff, fall within the rule of *Robb v. Green, supra*, and that stated in *Helmore v. Smith, supra*, as follows:

"The servant may resort to fair competition, but if entrusted with important information, viz.: the names of customers of the firm reduced to a list, * * * it is implied in the contract between the master and servant, that such confidential information shall not be used to the master's disadvantage."

Justice Story (2 Story, Equity, Section 952) adopts this doctrine, stated as follows:

"Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not in such cases whether the secrets be secrets of trade, or secrets of title, or any other secrets of the party important to his interests." See also High, Injunctions, 1108.

Upon the whole case, therefore, I am satisfied that the plaintiff has established his right to relief as prayed and that the injunction should be made permanent, with such modifications as may be necessary to conform with the views herein expressed, and it is so ordered.

If counsel can not agree upon the form of the injunction order, drafts may be submitted.

Decree for plaintiff, with order for permanent injunction.

Chas. B. Wilby, for plaintiff.

John C. Healy and *A. L. Herrlinger*, for defendant.

ANNA HOLZENKAMP V. CINCINNATI TRACTION CO.*

For the purpose of responsibility for negligent acts producing injury the relation of carrier and passenger begins when a person, intending in good faith to take passage, and with the express or implied assent of the carrier, places himself in a position necessary to avail himself of the facilities for transportation which the carrier offers; but the fact of physical contact with the car is not an indispensable criterion of the carrier's liability.

HOSEA, J.

Motion for new trial.

This motion raises an interesting question, by no means easy of solution, namely: When and under what precise circumstances does one who intends to take passage upon the vehicle of a common carrier become a passenger to an extent entitling him to recover for injuries received through negligence of the carrier, under the law applicable as between carrier and passenger?

In the case at bar the plaintiff, with others, had gone to a near-by street crossing, where defendant's cars usually took up passengers, and stood near the track for the purpose of taking passage on said cars; and after the car had stopped for the purpose of taking them on board, and while the plaintiff, who had approached the car for the purpose of entering it, was about to do so, she was struck and severely injured by a falling trolley pole, dislodged and broken by the conductor who was shifting the trolleys from one set of wires to another.

The charge excepted to is as follows:

"(1) If the jury finds from the testimony that the plaintiff had gone to the corner of Franklin avenue and Harrison avenue, and that thereupon the car of defendant came to said point and stopped for the purpose of taking the plaintiff aboard as a passenger, and that it was at a point near a cor-

* Affirmed by Supreme Court, 74 O. St. —.

ner where the cars of the defendant were in the habit of stopping to take on passengers, and that plaintiff was standing in the street adjacent to and by the car track along which the car came going to the city, and that the plaintiff intended to get on the car and was about to do so, and the car stopped at the point where she was standing to enable her to do so; and if the jury find that just as the plaintiff was about to step on the car she was struck by the broken or falling trolley, then I charge you, that, for the purposes of this case, the plaintiff was a passenger on the car, and if the plaintiff was then and there struck and injured by the trolley breaking and falling upon her from said car, that a presumption arises in the absence of other proof that the traction company was guilty of negligence."

In the argument, objection is taken to the phrase "about to step upon the car," in which the word "about," used without any qualification, is thought to be misleading, because it does not necessarily mean actual physical contact with the car, in the act and with the intent of becoming a passenger thereon, which contact is assumed to be essential to the relationship of carrier and passenger. This narrows the inquiry to this, namely: Whether actual physical contact with the car, in the case of one in the act and with the intent of entering it, as a passenger thereon, is a necessary predicate of recovery?

Suppose that two intending passengers, about to take passage, under precisely the same circumstances, were injured by the falling of a trolley pole; and, of these two, one had a foot upon the step in the act of entering the car, and the other, although fairly in the act of entering the car, had not yet come in actual physical contact with the car; upon what rational principle should the one be entitled to recover for the injury and not the other?

We may admit, as a correct legal proposition, that the relation of carrier and passenger arises out of the passenger's submission of himself to the carrier for safe transport. In respect of injuries occasioned by the sudden and untimely starting of cars before passengers have gotten fairly aboard,

physical contact is made a prominent feature in decisions of courts thereon; but this is so, because this fact is the *sine qua non* of the injury itself. These cases, therefore, can not be accepted as authority for the proposition that physical contact is an exclusive prerequisite to recovery, in all cases; so that, even if, for the purpose of discussion, we accept physical contact as a general rule of decision, it must be with the understanding that it is subject to well-recognized exceptions, or, to use the language of a well-considered case to which I shall advert, that "it is not an inflexible rule."

Thus the principle is well established that the relation of carrier and passenger begins when one enters upon the premises of the carrier with intent to take a train or car in due course.

In *Gordon v. Railway*, 40 Barb., 546, the principle is thus expressed:

"Neither an entry into the cars upon a railroad, nor the payment of fare, is essential to create the relation of carrier and passenger. Being within the waiting-room, waiting to take the car, is as effectual to make one a passenger as if he were in the body of the car."

See also in general support of this principle: *Pitts & L. E. Ry. v. Gongwahr*, 1 O. S. C. D., 30 (22 Bull., 280); *Chicago & E. I. Ry. v. Jennings*, 89 Ill. App., 335; *Illinois C. Ry. v. Treat*, 75 Ill. App., 327; *Jeffersonville, etc., Ry. v. Riley*, 39 Ind., 568; *Barth v. Railway*, 142 Mo., 535 (44 S. W. Rep., 778); *Choate v. Railway*, 67 Mo. App., 105; *Exton v. Railway*, 63 N. J. Law, 356 (46 Atl. Rep., 1099).

The case of *Haselton v. Railway*, 71 N. H., 589 (53 Atl. Rep., 1016), is also instructive in this connection. It there appeared that a short board walk or platform—part of a public street—was utilized by a street railway for receiving and discharging passengers. A car, having stopped a little short of its proper position, an intending passenger walked back alongside the car to find a seat, but stepped off the end of the walk or platform and was injured. The defense was, among other things, that the man had not attained

physical contact with the car and was, therefore, not a passenger. But the court said, page 1017:

"Physical contact with the car was not necessary to constitute the plaintiff a passenger, and entitle him to the care due to that relation. *Rogers v. Steamboat Co.*, 86 Me., 261 (29 Atl. Rep., 1069; 25 L. R. A., 491); *Allender v. Railway*, 37 Iowa, 264; *Smith v. Railway*, 32 Minn., 1 (18 N. W. Rep., 827; 50 Am. Rep., 550); 4 Elliott Railroads, 2460; Booth, St. Rys., Section 326; Joyce, Elec. Law, Section 528."

By way of emphasis, this point is restated in the syllabus, as an independent proposition, as follows:

"It is not necessary that a person should have come in physical contact with a street railway car to constitute him a passenger and entitle him to the care due to that relation."

The principal ground of decision, however, was, that the company, having adopted and utilized the platform in question, it was, to all intents, their premises as to passengers and, therefore, the case was decided upon the principles exemplified in *Gordon v. Railway*, *supra*.

But, underlying these and other cases, is the broader principle, that, for the purposes of responsibility for negligent acts producing injury, the relation of carrier and passenger begins when a person, intending in good faith to take passage and with the express or implied assent of the carrier, places himself in a position necessary to avail himself of the facilities for transportation which the carrier offers. In the cases last cited, entrance upon a waiting platform or premises is the criterion of acceptance of the carrier's offer, and establishes the contractual relation as against negligence. But in the case of ordinary street cars, why should not the contractual relation be considered as established within what may be termed the *sphere of peril* incident to street cars, whenever a person has signaled a car and, in response thereof, the car has stopped to take the

passenger aboard? In this suggestion lies, I think, the true criterion of decision in such cases.

Thus, in *Smith v. Railway*, 32 Minn. (18 N. W. Rep., 827; 50 Am. Rep., 550), it is said:

"The rule is not inflexible that to entitle a person to such protection he must be actually within the vehicle or upon some portion of it. Otherwise he might, in good faith, and in the exercise of due care, place himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier, and the latter be bound to the exercise of ordinary care only. *Brien v. Bennett*, 8 Car. & P., 724; *Allender v. Railway*, 37 Iowa, 264; *Gordon v. Railway*, 40 Barb., 546; *Commonwealth v. Railway*, 129 Mass., 501; *Thompson, Carriers*, 42; *Hutchinson, Carriers*, Section 556; *Shearman & Redfield, Negligence*, Section 262."

The principle here indicated is more elaborately discussed in *Keator v. Traction Co.*, 191 Pa. St., 102 (43 Atl. Rep., 86; 44 L. R. A., 546; 71 Am. St. Rep., 758), arising, however, upon a state of fact in some respects different. The passenger held a so-called "transfer" from one line to another owned by the same company, separated by a city block. It was conceded that during the passage from one line to another, the party was not under the care of the company, but on reaching the point where she was to take the second car, and when going toward it from the street curb, and when about five feet distant from the car, she was injured by a falling trolley pole, just as in the case at bar. I quote the following from the opinion of Mr. Justice Dean, page 87:

"But, taking the undisputed facts, was the plaintiff's relation to defendant, at the time of the injury, that of a passenger? If so, then the burden was on defendant to show it had exercised a high degree of care towards her because of that relation. It offered no evidence as to the strength of the trolley pole—whether it had been subject to inspection at any time, whether age and constant use had destroyed the tenacity of its fiber, or even whether it was ever safe for its purpose. The fact stood out, undisputed,

that, in manipulating the pole in the usual way, it broke, and injured plaintiff. * * * Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons who, by neglect, cause injury in such situation to the passenger. But, in the case of these particular conveyances (electric cars) necessarily, and immediately on the car stopping at the end of the route, the motorman proceeds to reverse the trolley. Ordinarily, this is attended with no danger to any one. The act is performed while some of the passengers have alighted and are on the sidewalk, out of reach of the trolley pole; some are between the curb and the car, and probably some yet in the car. Can it be argued with any plausibility that, in changing the trolley pole, the carrier owes no duty to its passengers who are not out of reach of danger from a part of the very vehicle in which they have been carried? Clearly, the duty to the passenger, under such circumstances, with that kind of vehicle, does not end the moment the passenger's foot touches the street. And so with the next starting car. She has traversed the sidewalk, and is on the pavement * * * the car moves up to the end of the line in front of her, and stops; she steps outside the curb, and moves towards it; the seats are being reversed; two or three passengers are already in the car; when within four or five feet of it, she is struck by the broken pole, which of necessity is being changed. *Why is she within reach of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street; is not a mere spectator who, from curiosity or idleness, stands in that position with reference to the car. She is there because, under the stipulations of the contract then in her possession, she has a right to take passage on that particular car at that point. In no sense is she one of the general public on the highway. She is at that point, at that particular juncture, because she could not receive the consideration of her contract, * * * if she were anywhere*

else. If it were not for her contract, she would not be there at all. Surely, in such situation, under such circumstances, the carrier's duty to her was what it owed to a passenger—as much so as if her injury had been caused by a rotten step on the car. When she came within reach of the vehicle provided for her transportation, the carrier's duty was that she should not be injured by the vehicle, if the highest degree of care could prevent it. Such care appellant was bound to show affirmatively. It did not attempt to show it. Therefore it is answerable in damages for her injury."

I have italicised some of the latter sentences of this opinion which confirm the view I have hereinbefore indicated, namely: That where the party has come within the sphere of danger from such accidents as happened, at the invitation of the carrier, and as a necessary preliminary to entering the car, the relation of passenger is established as against negligence of the carrier. In such a case the responsibility of the carrier rests upon a principle analogous to estoppel—as where one, by representation or conduct, has induced another to alter his position to his detriment.

The principles enunciated in *Keator v. Traction Co.*, *supra*, apply, as it seems to me, with equal force to an intending passenger, who has taken a position near the track, hailed the car, and the car has stopped to enable him to get aboard. Here is—under the custom and the necessary conditions inherent in the business—a proposition on one side and acceptance on the other. The passage contract is complete. The further facts as to boarding the car and paying the passage money relate to the execution and not to the making. They are *evidential* facts merely, and not *conditions precedent* to the completion of the legal obligation.

This I understand to be the basis of Lord Abinger's ruling in *Brien v. Bennett, S. C. & P.*, 724, where a gentleman who has hailed and stopped an omnibus, and "just as he was putting his foot on the step," was thrown down and injured by the starting of the vehicle. The court said:

"I think that the stopping of the omnibus implies consent to take the plaintiff as a passenger and that it is evidence to go to the jury."

A similar state of fact arose in *Gordon v. Railway*, 175 Mass., 181 (55 N. E. Rep., 990, 991), in which Justice Holmes, now of the United States Supreme Court, said:

"The judge was right in his ruling as to the deceased being a passenger. He was a passenger, if the car had stopped for him and he was in the act of getting aboard when the car started."

In *Gordon v. Railway*, *supra*, there was testimony that the man had one foot on the running-board; but, as the chief justice ignores this fact, and as it appeared that the testimony was conflicting and contradictory as to details, his expression of the law must be understood as clearly independent of the fact of physical contact.

In *Schaefer v. Railway*, 128 Mo., 64, 71 (30 S. W. Rep., 331, 332), the court, in commenting on *Schepers v. Railway*, 126 Mo., 665 (29 S. W. Rep., 712), uses this language:

"The offer must be made to become a passenger on one part, and an acceptance on the part of the company of the passenger on the other, before the relation of carrier and passenger can be said to exist."

In *Schepers v. Railway*, 126 Mo., 665 (29 S. W. Rep., 712, 714), the statement of the rule is as follows:

"It is true that an acceptance must, in many cases, be implied. When a street car has stopped at a usual place for receiving passengers, an acceptance of all persons who are waiting to take passage must be implied, as it may be impossible for each to be separately recognized. So 'where a person intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform.' Booth, St. Railways, Section 326; *Smith v. Railway*, 32 Minn., 2 (18 N. W. Rep., 827)."

While in neither of these cases was the precise point under discussion here involved, yet the form of statement seems necessarily to exclude the recognition of the rule of physical contact as a prerequisite to recovery.

In this court there is a decision made in 1898, and the only one in Ohio courts, so far as I am aware, that may be regarded as in point, though the statement is brief and the facts not given, namely, the case of *Carney v. Railway*, 8 Dec., 587, in which there is this expression:

"It was claimed by the defendant company, that Carney had not intended to or had not become a passenger, but if he had signaled the car and the car had stopped for him, he had virtually become a passenger."

The passenger in that case, as I find upon investigation, was injured by the falling of the signboard from the car, and in this respect the case is similar to the one at bar.

The case of *Donovan v. Railway*, 65 Conn., 201 (32 Atl. Rep., 350; 29 L. R. A., 297), although complicated by defects of pleading and other matters affecting the decision, is cited as an opposing authority; but I do not so understand it. The facts differed so widely from those at bar, that it did not necessarily call for an expression especially applicable, yet the language is (page 351):

"His (the carrier's) special duty begins when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of passenger to carrier is assumed."

This case and the somewhat similar one of *Mitchell v. Railway*, 4 Misc., 575 (25 N. Y. Supp., 744), do not seem to be in line with the principles, deduced from the weight of authority and reason applicable to cases of this nature, where, as expressed in *Smith v. Railway*, *supra*, the intending passenger might, "in good faith, and in the exercise of due care, place himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier."

This basic rule is in harmony with fundamental principles applicable to all carriers alike, and is consonant with

reason and justice. Where physical contact with the car is not a necessary condition of the injury, it is not a criterion of the carrier's liability.

Applied to the case at bar, it is fatal to the motion.
Motion for new trial denied.

C. W. Baker, for plaintiff.

J. R. Foraker, for defendant.

L. B. REAKIRT V. EDWIN BESUDEN ET AL.*

HOSEA, J.; SMITH and FERRIS, JJ., concur.

This cause comes up on reservation from the court below, being a suit in foreclosure upon a policy of insurance assigned by Mr. and Mrs. Besuden to plaintiff, as collateral security to certain notes. The material facts are as follows:

In May, 1889, Edwin Besuden, then unmarried, took an endowment policy in the Provident Life & Trust Company of Philadelphia, in the amount of \$15,000, payable May 29, 1921, or in case of prior death, to his executors, administrators or assigns. Besuden subsequently married, and on July 28, 1890, executed to his wife assignment as follows:

"Assignment conditional upon the survival of the assignee. For value received, I hereby transfer, assign, and set over unto Annette R. Besuden and my assigns, all my right, title, and interest in policy of insurance issued by the Provident Life Trust Company of Philadelphia, No. 38609, dated May 29, 1889, and all advantages to be derived therefrom, provided the said assignee should survive me, otherwise all right, title and interest in the said policy is to revert to me as fully as if this assignment had never been made.

*Affirmed by Supreme Court, 74 O. St. —.

"Witness my hand and seal this 28th day of July, 1890.
1890.

"Sealed and delivered in presence of (the person insured to sign here) Edwin Besuden (L. S.).

"(Witness to sign here) Wm. D. YERGER.

"(Witness to sign here) S. P. ELLIS."

The assignment, as appears, was duly recorded with the company on July 30, 1890.

It is admitted by counsel for both parties, that the words "my (assigns)" in this document, is a clerical error, and should be read "her (assigns)," so that no contention is made on this point.

On September 29, 1894, Besuden purchased the entire interest of L. B. Reakirt in the E. Besuden Co., paying cash \$2,000, and giving notes for balance of \$4,000, at one and two years, and, to secure these notes, pledged certain stock shares in the Clark Carriage Company, and, together with his wife, executed an assignment of the above mentioned insurance policy to Reakirt also as collateral security.

In 1896, '97, '98, '99, 1900 and 1901, Besuden failing to pay the premiums on the policy, Reakirt, to keep the policy alive, paid the annual premiums of \$391.95 each, and in 1900 Besuden repaid to Reakirt \$625 of the amount so advanced.

The plaintiff in his petition, filed in September, 1900, asks that an account may be taken of the amount due him upon the notes, and for the premiums advanced by him, with interest, and that upon failure of Besuden to pay said amount, within a time to be designated, the policy be sold under the court's discretion, and his debt paid from the proceeds.

The defendants contend:

(1) That the assignment by Mrs. Besuden to Reakirt of the insurance policy is void under Section 3629, Revised Statutes.

(2) That Reakirt is not entitled to recover back the

premiums paid by him because there was no contract with Mrs. Besuden respecting them.

(3) That by reason of the extension by Reakirt of one of the notes, the policy was to that extent at least released as security.

Waiving all questions arising from the fact that the assignment is merely of a contingent interest in an endowment policy, and assuming the policy to be of the general character contemplated by the statute, Section 3629, the vital question as presented, is whether the wife took an assignable interest.

The material parts of Section 3629, applicable to the case are as follows:

(a) "A policy of insurance on the life of any person duly assigned, transferred, or made payable to any married woman, * * * whether such transfer is made by her husband or other person, shall inure to her separate use and benefit and that of her children independently of her husband or his creditors," etc.

Then follows an exception, namely:

(b) "and if by its terms, or a transfer thereof, a policy is payable to a married woman solely for her use, she may sell, assign, or surrender the same, but the party whose life is insured shall concur in and become a party to the transfer."

It is claimed by the husband and wife, as against the foreclosure, that, by virtue of the clause first quoted, the assignment of the policy to the wife inured to her, and her children jointly, and that her re-assignment to Reakirt was void; and that no authority can be derived by her under the second clause quoted, for the same reason.

In considering the proper construction to be given the statute in question, it should be premised, that, so far as it introduces any limitations, it engrafts them upon that general freedom of contract which it is the policy of the law to uphold. But, as pointed out by our Supreme Court

in *Ryan v. Rothweiler*, 50 O. S., 602, the original statute of 1847, and certain of its amendments, constituting together the present Section 3629, were merely declaratory of conditions and limitations already existing. "The statutes were passed," says the court, "as is often done, to express, define, limit, and make certain, a power which already existed."

So far as the solution of the question here turns upon mere phraseology, it will be observed that the words "shall inure to the separate use and benefit of the wife and that of her children," are substantially defined by what follows, namely, "independently of her husband or his creditors," etc.; that is: where a policy is made payable to a married woman, it shall so inure.

But in the exception clause, the words, "solely for her use," are in like manner defined by following words, namely: "she may sell, assign or surrender," etc.; that is, if the assignment, or the policy itself, shows that the policy is given her solely for her use, then she takes an assignable estate.

This second clause of the statute seems to be inserted merely to make clear and certain the meaning of that first quoted; that is to say, said first clause has relation to an assignment to a married woman, simply, and without any qualifying words expressing the assignor's intention, and operates to fix upon such assignment a presumptive intention to make provision for a married woman and her children jointly, and therefore the policy is not assignable by her.

The dispute then narrows itself to this, namely: whether the assignment in question falls within the first named clause or the exception which follows. The assignment is to the wife and assigns; and also contemplates a reversion back to the husband in case of the wife's prior death.

The assignment manifestly, as it seems to us, falls within the exception, for the reason that the test of an estate "solely for the use" of the wife is, by the terms of the statute, its assignability; and this quality is given by the use of the words "and her assigns" in the instrument of

transfer—these words having a fixed legal meaning and effect, elementary in the law of conveyancing. The estate conveyed therefore is by direct terms made assignable, where, under the statute, this result would be deduced from any phraseology indicating an intention to give the wife an estate solely for her use. In other words, assignability being the quality of estate intended by the statute in the description “solely for her use,” the expressions are practically synonymous; so that words creating assignability of estate must be held as bringing the case within the exception intended by statute.

This construction seems the more reasonable, in view of the obliteration of the distinction between separate and general estates of married women by our modern statute, Section 3114, placing married women on an independent basis in respect of property rights.

As to the claim of release of surety by extension of one of the notes, it is sufficient to note that the burden is upon the surety to prove that the extension was granted upon a definite agreement based upon a sufficient consideration. The record before us does not meet this demand of proof. *Osborn v. Low*, 40 O. S., 347 (351).

The contention as to the right of a pledgee to look to the pledge for reimbursement of sums paid to keep the security alive, rests affirmatively upon doctrines so well established, that we do not deem it necessary to review the authorities. The case falls within the familiar principle that a mortgagee in possession is entitled to his expenses rendered necessary to preserve the property, because such outlays are equally for the benefit of the mortgagor. The rule is held to apply equally to securities such as that involved in the case at bar. *Leslie v. French*, L. R., 23 Ch. Div., 552.

Judgment for plaintiff.

SMITH, J.

I concur in the results reached by the majority of the court in this case; but I reach the conclusion that the as-

signment was effective by a different method of reasoning.

The main question in this case is: Was the instrument of transfer signed by Edwin Besuden and Annette R. Besuden sufficient to convey the policy to Llewellyn B. Reakirt as collateral security for his debt?

The transfer from Edwin Besuden to Annette R. Besuden is as follows:

"For value received, I hereby transfer, assign and set over unto Annette R. Besuden and assigns, all my right, title and interest in policy of insurance issued by the Provident Life & Trust Company, of Philadelphia, No. 38609, dated May 29, 1899, and all advantages to be derived therefrom, provided said assignee should survive me; otherwise all right, title and interest in the said policy is to revert to me as fully as if this assignment had never been made."

The contention that the assignment by Edwin Besuden and Annette R. Besuden to Reakirt was not effective is based upon the claim that the transfer by Edwin Besuden to Annette R. Besuden was not "solely for her use" as provided in Section 3629; that her children therefore acquired an interest in the policy and therefore the assignment of the policy was not good without the consent of the children.

Section 3629 in one clause declares that:

"A policy of insurance on the life of any person duly assigned, transferred or made payable to any married woman or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her separate use and benefit, and that of her children independently of her husband or his creditors or of the person effecting or transferring the same or his creditors;" and in the latter part of the same section it is declared that:

"And if by its terms, or a transfer thereof, a policy is payable to a married woman solely for her use she may sell, assign or surrender the same, but the party whose life

is insured shall concur in and become a party to the transfer."

It seems to me that this statute has no application to the case at bar, for the reason that both provisions of the statute above referred to have reference only to a case where a policy of insurance is transferred absolutely to a married woman. In such a case the transfer inures to the benefit of her children, and she can not assign it without their consent unless in the language of the statute it is transferred to her "solely for her use."

In *Sticken v. Schmidt*, 64 O. S., 354, 359, the policy of insurance was on the life of the husband and the policy was payable to his wife, Louisa Keck, or in the event of her death prior to that of the assured, to his surviving children share and share alike, or in the event of no children surviving, then to the legal representatives of the insured.

The policy in *Sticken v. Schmidt*, differed from the policy in the case at bar before the assignment to Reakirt in only one respect. It provided in a certain contingency that it should go to the children, whereas this policy with the transfer contains no such provision; but in both policies the wife was to get the benefit of the policy only in the event of her surviving her husband.

It was held in *Sticken v. Schmidt*, that Section 3629 did not apply to such a policy. The court said:

"Both provisions (of the statute), it will be noticed, are applicable only to policies in which the wife is the sole beneficiary named, and which are issued for her sole use. The defendant's policy was not of that nature and was not within the purview of the statute. By its terms the children and personal representatives of the insured were made beneficiaries and had an interest of the same general nature as that of the defendant though more remote. The interest of each depended on the contingency of survivorship; and it seems evident that she could not by a sale of the policy without the consent of the other beneficiaries any more than could they by sale without her consent confer any title on

the purchaser, nor could either without the concurrence of all surrender the policy, or accept a paid-up one in its stead."

If the words "the children" are omitted from the above citation, it is applicable exactly as it is written to the policy in the case at bar; and it therefore follows that Section 3629 is not applicable to such a policy, and since the only beneficiaries were the husband and wife and both had joined in the transfer of the policy, the transfer has been made by all persons having an interest in it, and the transfer is effective.

Sayler & Sayler, for defendant.

WALLACE BURCH V. GEORGE B. HARTE (CLERK).

1. An indorser of a promissory note who, as collateral security therefor, secured from the maker an assignment of his *unearned* referee fees to the holder, thereby incidentally securing against his own liability as indorser, is not, under the Ohio code of civil procedure, a "party in interest" in a contest between a subsequent assignee of the *earned* fees and the holder of the note, both of whom are claiming by virtue of their respective assignments from the referee.
2. Referees appointed by courts of record, under the code of civil procedure of Ohio, are "public officers," and as such become adjuncts to the judicial system of the state, clothed with some of the powers and duties of the judicial office. The object of their appointment is to relieve the courts of detail work, thereby contributing to the due and speedy administration of justice.
3. A referee's fee is not earned until a finding of facts has been made and the law applicable thereto decided by him, which duties constitute the chief functions of his office; and no compensation, separate and apart from the final completion, is provided for the preliminary labor, however onerous, which may be required to enable him to fully discharge such functions. Until final completion, an inchoate right to compensation, only, exists, which can not be the subject of assignment.
4. An assignment of unearned fees by a referee, who is a public

officer, is against public policy, and void; but an assignment of earned fees may be sustained.

5. A preëxisting debt will not support an assignment of fees as collateral security therefor as against a subsequent *bona fide* assignee for value without notice. The equitable maxim "first in time, first in right," is applicable only where equities are equal.

HOSEA, J.

The essential facts of the controversy are as follows:

The plaintiff claims the sum of \$500 out of a sum of \$1,000, in the hands of Harte, Clerk of the Court of Common Pleas of Hamilton County, by virtue of his office, being fees allowed the late Philip Kumler for services as referee in a certain suit. The claim is based on an assignment, in writing, from said Kumler, dated September 28, 1899, and filed with said clerk.

Upon motion of the clerk an order of interpleader was duly entered, and Scott Bonham and C. D. Robertson, made defendants, have filed answers and cross-petitions, both the latter standing upon an assignment from Kumler to Bonham executed August 30, 1898, and notice thereof given the said clerk on October 17, 1898.

The connection of Robertson with the matter is only indirect and incidental. He is indorser upon a note given by Kumler to Bonham in 1893, and procured the assignment by Kumler to Bonham in 1898 as collateral to said note in relief against his own liability as endorser. This does not make him a "party in interest" under the code. Bonham's answer and cross-petition in his own behalf covers all legal interest in this regard; consequently Robertson may be dismissed as an unnecessary party to the action.

It further appears, that at the date of the Bonham assignment in 1898, a number of hearings had been had by the referee, but no report had been made by him, and no allowance of fees had been made by the court.

The first allowance for services rendered was made and entered by the court on July 24, 1899, for the sum of \$500;

and on September 28, 1899, Kumler assigned said allowed sum (or, as he expressed it, his "judgment for costs, amounting to \$500") to the plaintiff, Burch, for a consideration of \$450, cash paid to him therefor, which assignment is the predicate of this action.

Considerations of an equitable nature were touched upon in the very able arguments of counsel; but these must abide the determination of the main question involving the validity of the Bonham assignment.

The plaintiff contends that under the rule long established in England, and by many authorities in this country, the assignment by a public officer of his unearned compensation as such, is void as against public policy.

It is urged by defendant, (1) that this rule is not recognized in Ohio; and (2) that if it were, it has no application to a "referee" under our law.

The main doctrine, holding such assignments invalid, has long been the law of England. In *Hill v. Paul*, 8 Clark & Fin., 307, Lord Chancellor Lyndhurst quotes, as showing the law at a much earlier date, a terse expression of Lord Eldon, namely:

"A pension for past services may be alienated; but a pension for supporting the grantee in future services is inalienable."

In *Liverpool v. Wright*, 28 L. J. Ch. (N. S.), 871 (1859), Wood, vice-chancellor, discussing the reasons on which the doctrine rests, says:

"There is a second ground of public policy, for which the case of *Palmer v. Vaughan*, 3 Swanst., 173, is the leading authority, which is this: That nobody can deal with the fees of a person who holds an office of this description (clerk of the peace), because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him, for the purpose of upholding the dignity and performing properly the duties of that office, and, therefore, it will not allow him to part with any portion of those fees, either to the appointer

or to anybody else. He is not allowed to charge or incumber them. * * * Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held therefore to be void."

Many other English cases, both earlier and later, reiterate the same doctrine without dissent.

In this country the case of *Bliss v. Lawrence*, 58 N. Y., 442 (17 Am. Rep., 273—1874), is generally regarded as the leading one. It arose upon an assignment by a clerk in the United States treasury department of a month's salary in advance.

The court says:

"The controlling question in these cases is that of the lawfulness of an assignment, by way of anticipation, of the salary to become due to a public officer. * * *

"Salaries are, by law, payable after work is performed and not before, and, while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the places of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."

The court discusses the English authorities, and continues:

"Similar questions have arisen in respect to persons not strictly public officers, but the principle before stated has, in the courts of England, been adhered to firmly. * * *

"The substance of it all is, the necessity of maintaining the efficiency of the public service by seeing to it that the public salaries really go to those who perform the public service. To this extent, we think, the public policy of every country must go to secure the end in view."

The general rule thus indicated has been followed and adopted in many states in a number of cases, of which the following are examples: *Schloss v. Hewlett*, 81 Ala., 266 (1 So. Rep., 263, 266); *King v. Hawkins* (Ariz.); *Bangs v. Dunn*, 66 Cal., 72 (4 Pac. Rep., 963); *Ellis v. State*, 4 Ind., 1; *Holt v. Thurman*, 23 Ky. Law, 92 (63 S. W. Rep., 280); *State v. Williamson*, 118 Mo., 146 (23 S. W. Rep., 1054; 21 L. R. A., 827; 40 Am. St. Rep., 358); *King's Estate, In re*, 110 Mich., 203 (68 N. W. Rep., 154); *Wayne Tp. v. Cahill*, 49 N. J. Law, 144 (6 Atl. Rep., 621); *Worthington, In re*, 141 N. Y., 9 (35 N. E. Rep., 929; 23 L. R. A., 97); *Elwyn's Appeal*, 67 Pa. St., 367; *Butts v. Charleston Co.*, 17 S. C., 585; *State v. Barnes*, 10 S. Dak., 306 (73 N. W. Rep., 80); *National Bank v. Fink*, 86 Tex., 303 (24 S. W. Rep., 256; 40 Am. St. Rep., 833); *Stevenson v. Kyle*, 42 W. Va., 229 (24 S. E. Rep., 886; 57 Am. St. Rep., 854); *Shannon v. Bruner*, 36 Fed. Rep., 147.

It is also adopted by text-writers. Story, Equity, Section 1040d; Mechem, Pub. Off., Section 874; Greenhood, Pub. Pol., 351 (Rule 297).

The case of *Schloss v. Hewlett*, *supra*, gives this very excellent statement of the reasons for the rule:

"It is very easy to see how great abuses would follow if such transfers were permitted. Not only would there exist a constant temptation to anticipate future earnings, under the stress of present financial pressure, at usurious rates of discount; but, when completed, one of the strongest incentives to industrious exertion—the expectation of pecuniary reward in the near future—would be gone."

Another well-considered case is that of *National Bank v. Fink*, *supra*. The court of appeals of the fourth judicial circuit certified the following question:

"Is it contrary to public policy in this state for a public officer (he having qualified and been in office) to give a lien upon his unearned official compensation?"

The officer was an assessor, and the court, after citing a formidable list of English and American authorities, says:

"There is no distinction between the assignment of *unearned fees* and the assignment of *unearned salary*. If anything, the reason is stronger for holding such assignments of fees void than for holding a like assignment of salary to be invalid; because a salary is a fixed sum for a given time, and there could be no doubt as to the amount to which the assignee would be entitled; while in the case of fees to be paid by the county or state, the officials would be required to go into a settlement of the question of amount, with many different persons in some instances, which would confuse and embarrass the public business."

In *Bowery Nat. Bank v. Wilson*, 122 N. Y., 478 (25 N. E. Rep., 855; 9 L. R. A., 706; 19 Am. St. Rep., 507), the court employs similar reasoning, overruling a case in 50 How. Pr., 143, upon the assignment of the unearned fees of a justice of the peace; and the same rule is applied again in *People v. Roberts*, 155 N. Y., 408, 412 (50 N. E. Rep., 53; 41 L. R. A., 228).

Only one case squarely repudiates the doctrine, namely, *State v. Hastings*, 15 Wis., 75, 83; but this latter case has been disapproved in many subsequent decisions; among them being *Bangs v. Dunn*, 66 Cal., 72 (4 Pac. Rep., 963); *National Bank v. Fink*, 86 Tex., 303 (24 S. W. Rep., 256; 40 Am. St. Rep., 833); *State v. Williamson*, 118 Mo., 146 (23 S. W. Rep., 1054; 21 L. R. A., 827; 40 Am. St. Rep., 358); *Bowery Nat. Bank v. Wilson*, 122 N. Y., 478 (25 N. E. Rep., 855; 9 L. R. A., 706; 19 Am. St. Rep., 507).

The Texas court, in *National Bank v. Fink*, *supra*, thus voices the general disapproval:

"So slight a consideration of the number of cases decided by courts of eminent ability shows that the court in that case (*State v. Hastings*), did not give sufficient thought to the question involved to entitle the opinion to weight."

Brackett v. Blake, 48 Mass. (7 Metc.), 335 (41 Am. Dec., 442—1844), was cited at the hearing as opposing the rule; but upon examination I do not so consider it. In that case the question of public policy, though incidentally mentioned by counsel, was not considered, since the judgment proceeds solely upon the finding that the assignment of salary covered a possibility coupled with an interest, and not a mere naked expectancy.

This case has been distinguished in other subsequent cases, notably, *Bliss v. Lawrence*, and *State v. Williamson*, *supra*; and is practically repudiated in *Hadley v. Peabody*, 79 Mass. (13 Gray), 200, which holds that the quarterly salary of a public school teacher, holding under an annual salary payable quarterly, can not be reached by trustee proceedings (similar to garnishment in Ohio), prior to the completion of the quarter, upon any theory of proportional earning for time served. The court say:

"It was not a debt and might not become a debt; the contract was entire, and, until completed on the part of the teacher, nothing was due."

There is an expression of doubt by the authors of Pomeroy's Equity (who are California lawyers), in a note to Section 1276, as to the applicability of the English rule to the conditions of this country, and their belief that the American law will not go beyond statutes upon the subject; but the authors cite only a meager list of authorities, and those relate solely to the effect of special United States statutes prohibiting such assignments. No question of public policy was involved in those cases, excepting that the United States statute in question is to all intents

a practical embodiment of the doctrine of public policy under consideration.

In view of the decided weight of authority in favor of this doctrine, of the character and number of eminent authorities upholding it, and of the cogent reasons advanced for its support, I feel constrained to accept and apply it as law for this case, unless, indeed, there exists controlling authority in Ohio to the contrary; or, upon due consideration, I shall be satisfied that a "referee" under our law is not a "public officer" within the scope of the rule.

But in view of defendant's contention that, at the date of the assignment of August, 1898, the referee had already had a number of sittings, and had, therefore, to some extent at least, already *earned* fees, it must be premised that the mere taking of testimony is but the basis and preparation for the duty which the referee is to perform, namely, to consider, decide and report upon the facts thus elicited. The real duty, which is the chief function of the referee, is the "*finding*" of facts and the "*deciding*" upon the law applicable thereto. If, for example, a referee should die after "hearings," but before finding and decision, the work done would avail nothing. His successor must begin *de novo*. It seems but reasonable, therefore, to conclude that the mere preliminary labor of the referee, however onerous, required in order to enable him to discharge the real function of his office, is not the thing for which compensation is provided, apart from its final completion and result.

The case of *Hadley v. Peabody*, *supra*, is an authority on this point; and a still more pertinent authority is *Worthington, In re*, *supra*, to which I shall have occasion to refer later, together with Ohio authority.

Upon both reason and authority, it must be held that the subject of the assignment of August, 1898, was the *unearned* fees of the referee, and the defendant can derive no benefit from the fact that some labor had already been performed; for, under our statutes, the fees of a referee are to be determined and "allowed" by the appointing

court, and, until so allowed, there exists but an inchoate right.

Coming now to the question whether a referee, under Ohio statutes, is a "public officer" within the rule of public policy herein considered, it is to be noted at the outset that the constitution of Ohio does not employ or define the term "*public officer*." It is in this respect, as Webster characterized the federal Constitution, "an instrument of enumeration rather than of definition."

Section 27, Article II, provides that—

"The election and appointment of *all officers*, * * * shall be made in such manner as may be directed by law."

Under this section our Supreme Court, in *State v. Kennon*, 7 Ohio St., 546, 547, hold that:

"Emolument is a usual but not a necessary element to constitute an office. Authority and power relating to the public interest, conferred by statute, and which may be vested in a board or individuals by election or the appointing power of the state, create an office. Whatever less than this may constitute an office," the court holds, "is unnecessary to determine." See also *State v. Corington*, 29 Ohio St., 102.

The section quoted, and the decision explaining it, taken in connection with Section 29, Article II, specifying three classes of public servants, namely, "officer," "public agent" and "contractor," suggest a reason for the distinction between a "public officer," properly so-called, who is *invested with some authority and power of the state*, and subject, therefore, to certain responsibilities peculiar to the public service rendered necessary by the interests of the public, and a mere "agent" or "contractor" upon whom no such responsibility rests. Certain requirements relating to personal eligibility to office are also specified in the Constitution, as, that one must be an elector, must not be a duellist, and must take an oath, etc. Sections 4, 5 and 7, Article XV.

Referees, under our code, are clearly adjuncts to the

judicial system of the state, and clothed, to some extent at least, with the powers and duties of the judicial office. Our statutes provide for their appointment by a court, with or without the consent of parties, prescribe their duties, require an official oath, and provide for compensation to be allowed by the court in its discretion. Section 5213, Revised Statutes, provides that a "trial by referees shall be conducted in the same manner as a trial by the court," with power to "summon and enforce the attendance of witnesses administer all necessary oaths in the trial;" "grant adjournments, the same as the court," "find facts," state "conclusions of law" and give "decisions" which may be excepted to and reviewed, and which, unless the reference be merely to report facts, "stand as the decision of the court," and upon which "judgment may be entered thereon in the same manner as if the action had been tried by the court."

The object and purpose of the appointment of referees, as will appear more fully by reference to the multitude of statutes designating the various classes of questions that may be submitted to them, is to relieve the courts, and contribute to the due and speedy administration of justice in the general interest of the public, by doing detail work. This is illustrated in the case at bar, by the referee's appointment to ascertain the identity of numerous stockholders and to proportion and assess their statutory liability.

Our Supreme Court has had occasion to consider this matter somewhat, and its views are instructive in this connection. Thus, in *Lawson v. Bissell*, 7 Ohio St., 129, 132, the court say:

"Instead of submitting the case to a jury or the court, the code provides for a third mode of deciding the issues of fact and law; and this is by referees. The referees are substituted for the court and jury; and their province is to decide the facts of the case, if the facts only are submitted; or both the facts and the law of the case, if both are referred. * * *

"These provisions of the code show very clearly that while the trial before the referees is subject to the review and revision of the court ordering the reference, it is a substitute for a trial in court. The finding of facts is, in effect, the special verdict of a jury. The conclusions of law of the referees stand as the law decision of the court; and if not set aside, a judgment follows of course."

Bell v. Crawford, 25 Ohio St., 402, discusses the effect of *Lawson v. Bissell*, *supra*, on reports of master commissioners, and is valuable as an exposition of the duties and powers of master commissioners and referees. *Cincinnati v. Cameron*, 33 Ohio St., 336, 356, holds, *passim*, that:

"The referee is substituted for the court, and the cause proceeds before him as though it was tried in court, and upon submission." (Citing above cases.)

In the light of the statutory proceedings and of the judicial comments cited, it is difficult to see why a referee, under Ohio laws, is not a "public officer" in a reasonable and proper sense within the general doctrine of public policy under discussion. There can be no question that a judge of a court of record is a public officer, because the nature of his duties makes him one of the agencies for administering one of the three great powers of government, apportioned by the constitution between the three administrative departments of the state—the legislative, the executive and the judicial. The "referee," under our law, is, as declared by the Supreme Court, a "substitute for the court and jury," and falls quite within the definition of Mechem, Pub. Off. & Off., Section 1, as follows:

"A public office is the right, authority and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested in a public officer."

Indeed, the referee seems to fall also within the limited

definition of the same author, which discriminates between an office and mere employment or contract, for here is a "*delegation to the individual of some of the sovereign functions of the government to be exercised by him for the benefit of the public.*"

The case of *Hathaway, Estate of*, 71 N. Y., 238, has been cited as authority for the opposite view; but upon careful reading it will be found, that, while the court uses expressions that without the context might seem to be of general application, it was in reality dealing with a purely technical question, under a clause of the Constitution of New York prohibiting the justices of the Supreme Court from exercising "any power of appointment to public office." The holding, therefore, that referees, receivers, etc., were not "public officers *within the inhibition of the Constitution,*" and therefore could be appointed by the judges, is purely technical and local, and is not applicable as a countervailing authority under the more general considerations of public policy involved here.

It will not pass without notice that the same court that held "referees" not to be "*public officers,*" under a clause of the constitution of New York, is the leading authority for the doctrine under consideration (*Bliss v. Lawrence, supra*); and that in a much later case (*Worthington, In re, supra*), applied it even to executors, as we shall see.

As an offset to this decision, in any aspect, the ruling of Justice Brewer of the United States Supreme Court, then circuit judge, in *Shannon v. Bruner*, 36 Fed. Rep., 147, may be now more particularly referred to as showing that the doctrine under consideration is not so limited. The question was upon the validity of an assignment of the unearned fees of a master in chancery, and the court says:

"Now, can an officer make an assignment in advance of his fees or salary? The law is very clear that he can not. Public policy has affirmed the necessity of securing to every public officer, when earned, his fees or salary, unhindered by any present legal attack or any previous voluntary assignment. There are many cases, both in England and this

country, affirming the necessity of upholding such public policy."

After citing *Bliss v. Lawrence*, *supra*, and discussing *State v. Hastings*, *supra*, in opposition, he continues:

"But the general voice of authority, both across the water and here, is, that no voluntary assignment can be sustained by a public officer of fees or salary yet to be earned."

It will be sufficiently obvious, that for the practical purposes of this case a master and a referee are substantially interchangeable quantities, although the duties and powers of the master are usually of a somewhat more limited nature; so that the views of Justice Brewer apply with equal if not greater force to referees.

Counsel for the defense, by way of the *reductio ad absurdum*, cite the case of notaries public, who they say are, in a sense, "judicial officers," yet not "*public officers*" under our constitution. But a notary public is, in fact, one of the few thus expressly recognized in that instrument. Section 4, Article II, refers to notaries public as "holding *office* under the authority of the state," and therefore are "public officers" in the sense of the argument used.

We pass now to the consideration of such Ohio cases as bear more or less directly upon the questions at issue.

The case of *Newark v. Funk*, 15 Ohio St., 462, holds that the salaries of officers of incorporated cities, due and unpaid, may be subjected by judgment creditors to payment of their judgments under Section 458 of the code (Section 5464, Revised Statutes).

It appears to have been contended that it was "against public policy to permit salaries and pay of their officers and public agents to be so garnisheed."

The court holds otherwise, but says, page 464:

"We do not say, or suppose, that a salary which is not yet earned, or for the payment of which the proper period has not yet arrived, can be so garnisheed, or attached. It must be a subsisting claim, due or to become due, and for the ultimate payment of which the obligation to pay is

fixed, without reference to future services or consideration."

This obviously excludes fees yet to be "allowed," the payment of which depends not only upon the completion of the service, but upon the allowance by a court thereafter.

Porter v. Dunlap, 17 Ohio St., 591, was cited by the defense in opposition to the general doctrine. A public school teacher, under annual salary, payable in quarterly installments, assigned his quarter's salary, in advance, to the township treasurer, authorizing him to retain it out of the money to come into his hands for the quarter's service, and subsequently, after receiving the order on the treasurer at the conclusion of the quarter for the salary then due, transferred the order to another, who had no notice of the former transfer. The court sustained the claim of the treasurer as a prior equity coupled with possession, treating the agreement of the teacher allowing the treasurer to retain the money out of funds which must eventually come through him, as collateral to the assignment, and creating an estoppel against the subsequent assignee in virtue of the acts of the assignor.

It does not appear that the doctrine of public policy, under present consideration, was invoked in the case, or was in any way referred to. The prior assignment was attacked upon grounds of public policy, indeed, but of an entirely different character.

But, under the views and authorities before cited, it may well be that neither court nor counsel regarded a school teacher as a "public officer" in any sense, under the doctrines here discussed.

An almost precisely similar case will be found in *Johnson v. Pace*, 78 Ill., 143, in which the action of the court was similar, and in the opinion there is this hint as to the reason:

"Nor do we discover here any such violation of duty or improper practice, as school officers, as is claimed by appellants, which should deny to Holmes (the prior assignee) the benefit of this money."

But the case contains no suggestion otherwise that the assignment was questioned on such grounds.

Carran v. Little, 40 Ohio St., 397, decided by the Supreme Court commission, presents a case of an assignment by a city solicitor of a quarter's salary in advance; but there is in it no hint or suggestion that the question of public policy was raised or considered. The suit turned upon the question of liability of the endorser of the order, and involved no question pertinent to the present consideration.

The case of *Overturf v. Gerlach*, 62 Ohio St., 127 (56 N. E. Rep., 653; 78 Am. St. Rep., 704), is important in its recognition of the public impolicy of permitting the unearned fees of a public officer to be sequestered.

The suit was against an executor under Section 5464, Revised Statutes. The court distinguishes the case of *Newark v. Funk*, 15 Ohio St., 462, and draws special attention, as I have done here, to the express limitation embodied in it.

The court further say, page 131:

"Whilst the embarrassment that might affect the public service in the attachment of the salary of a public officer, was not regarded, in the case above cited, of such a grave character, as, on grounds of public policy, to forbid its adoption by a creditor, yet its impolicy in the case of administrators, for the reasons stated, is more apparent than in the case of public officers, and has not been sustained by any court."

In discussing the nature of the executor's compensation, the court say, page 130:

"Overturf, * * * may not be entitled to the compensation and commissions provided by law at his final settlement. This will depend upon the judgment and allowance of the probate court. By reason of maladministration he may be entitled to nothing, and nothing may be allowed him. Hence, *until* one or the other of the two *estates*, * * * has been settled, or some allowance has been made him

by the probate court, it can not be said that anything is due him therefor."

The syllabus of the case is as follows:

"Until allowed by the probate court, the compensation and commissions of an administrator or executor * * * can not be attached, or, by any similar process, appropriated to the payment of his claim by a creditor of such executor."

Newark v. Funk, supra, forms an instructive supplement to that of *Worthington, In re, supra*, in which an executor assigned his commissions, in advance, and was subsequently removed for mental incapacity and died—all prior to his filing of final account and allowance of fees and commissions by the court.

The opinion of the court brings so fully and clearly into review underlying reasons which seem to me applicable to the case at bar, as to justify liberal quotation.

Says the court:

"It may be conceded that the assignment of the commissions was made for a good consideration and that the removed executor had actively participated for many years in the management and administration of the estate, and that his representatives were therefore entitled to some consideration upon the final allowance of commissions by the surrogate. The difficulty in the way of appellant is of another kind. Until ascertained and liquidated at the times and in the manner authorized by law, the commissions are not subject to the executor's disposal, but the right to them is inchoate, and, upon grounds of public policy, unassignable. There is no fundamental distinction in this respect between public and private trusts, where the statute fixes the compensation, and prescribes that it shall not become due and payable until the services have been rendered, or at stated periods during the term of service. It is well settled that a public officer can not, during his official term, and before his salary or fees become due and payable, make a valid assignment of such salary or fees (*Bliss v. Lawrence*, 58 N. Y., 442; *Bowery Nat. Bank v.*

Wilson, 122 N. Y., 478). * * * If the emoluments of the office might be separated from it and transferred to another, it would leave the duties of the office as a barren charge to be borne by the incumbent. It is evident that transfers of this kind would not tend to promote activity and care in the discharge of official obligations. The same considerations forbid the recognition of an assignment, by an executor, of his commissions in advance of the time prescribed by law for their adjustment and payment. When the hope of compensation is gone, a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax and perfunctory administration of the trust becomes more persuasive."

When it is considered that the functions of a referee, under our statutes, are not simply of an administrative character, as are those of an executor, but involve the exercise of judicial powers in hearing and rendering decisions upon both the law and the facts, which in some cases stand as and for the decisions of the court itself, it must be admitted that the reasons given by the New York court of appeals apply with even stronger force to referees. The question arising upon the application of the doctrine under discussion is not one to be determined upon a mere technical definition of the term "public officer," such as might be necessary under a power of appointment embodied in a state constitution, but is, whether the duties to be performed in relation to the governmental powers of the state and for the public benefit, are such as establish a proper basis for the application of a rule of public policy thoroughly settled by the great weight of authority.

Upon careful consideration of all authorities cited, and many others, I am clearly of opinion that the rule of public policy holding void the assignment of the unearned fees of a public officer is a most salutary one and should be upheld and enforced in cases like the present, where duties of a public nature are to be performed, compensation for which depends upon allowance by a court.

In no one of the Ohio cases, so far as I have been able to ascertain, has the doctrine of public policy herein dis-

cussed been brought distinctly before the court as the basis of decision. The *dicta* in *Newark v. Funk*, *supra*, refer to salaries already earned and due; as to which no question has been raised. The case of *Porter v. Dunlap*, *supra*, may be distinguished upon grounds already indicated; but even if it be taken as fixing a point of limitation beyond which the application of the rule of public policy should not be carried, still the case at bar falls clearly within and not without such limitation. The case of *Carran v. Little*, *supra*, was not one of conflicting claimants, and was controlled by considerations so diverse from those involved here, it can hardly be regarded as pertinent in any degree.

Therefore I do not find any objection, either in the letter or spirit of Ohio decisions, to the application of the doctrine of public policy upheld by the cited authorities to facts such as presented by the case at bar.

A further question, suggested during the argument, seems to me upon further consideration to be also decisive. The prior assignment was not given upon a moving consideration applicable thereto, but as an additional and collateral security for a pre-existing debt, namely, a note given by Kumler in 1893, endorsed by Robertson, being a wholly different transaction, having no connection with the appointment or services of Kumler as referee.

It is well settled that, in a contest between successive equities, the rule "*prior in tempore prior est in jure*" can be invoked where equities are equal, but not otherwise; and it is equally well settled that one who takes an assignment for a pre-existent debt, is not a *bona fide* purchaser and entitled to protection against one who pays actual and full value upon the faith and credit of the thing assigned—one "who has actually parted with his property upon the credit of the estate." 4 Paige, 215.

These are familiar doctrines of equity, applicable wherever kindred circumstances arise.

As applied to circumstances closely analogous to those of the case at bar, they will be found very fully discussed in the case of *The Elmbank*, 72 Fed. Rep., 610, 617 *et seq.*, citing many state decisions illustrating the general principle.

The case covers also the question of notice as it arises here, and is conclusive.

I hold, therefore, as between the two assignments under consideration that, upon both or either of the grounds stated, the assignment given to Burch, the plaintiff, must prevail, and judgment is rendered accordingly.

Burch & Johnson, for plaintiff.

Scott Bonham, for defendant.

MARY JUNIET V. BALTIMORE & O. S. W. RY.

The proper remedy for an unnecessarily prolix and confusing petition is a motion for the reformation and redrafting thereof.

Motion to strike from petition.

HOSEA, J.

These motions are well taken and will be granted. Section 5057, Revised Statutes, providing for the method of drafting petitions, requires "A statement of the facts constituting the cause of action, in ordinary and concise language." While the striking out of parts designated is only a partial remedy of the unnecessary and confusing prolixity, the petition should be re-formed and redrafted, and it is so ordered at the costs of plaintiff. *School Section 16 (Tr.) v. Odlin*, 8 Ohio St., 293, 297, 298.

Motions granted and petition to be reformed at plaintiff's costs.

C. W. Baker and *F. J. Dorger*, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

ALICE R. THOMS v. LOUIS B. THOMS.*

1. The inchoate dower of a wife is an incident of the seizin of the husband and can only be conveyed by her in connection with the husband's transfer of title.
2. While post nuptial contracts of separation are recognized in Ohio, neither husband nor wife will be aided by the courts in the enforcement of claims arising out of them if the contracts bear the appearance of irregularity or unfairness.

HOSEA, J.; FERRIS and PFLEGER, JJ., concur.

This case comes into this court from findings and judgment rendered at the special term in October, 1903. The suit was brought by Louis B. Thoms against Alice R. Thoms, his divorced wife, to quiet title to real estate, as against her inchoate right of dower.

The controversy here centers about a post-nuptial agreement executed by the parties in writing at Cincinnati, on January 24, 1896, providing in substance, as follows:

That the husband, L. B. Thoms, should pay to the wife, Alice R. Thoms, \$100 per month for three years, unless she should remarry within that period—this to be “not only for the benefit of said Alice R. Thoms, but also in full of all obligations and liabilities of said Louis B. Thoms, for the support and maintenance of their child, Joseph B. Thoms; and in full of all right and claim for alimony, maintenance, or support, or property interests in the estate, or earnings of Louis B. Thoms, against him for all time to come.”

She was also to have the household furniture belonging to either of them, excepting the books and pictures; and in consideration of what precedes, she was to quit-claim by deed, contemporaneously with the contract, all her dower or other interest in all real estate in which Louis B. Thoms has any interest.

It is admitted that Mr. Thoms paid the \$3,600, also certain small debts incurred by Mrs. Thoms, as indicated by

* Affirmed by Supreme Court, 73 O. St. 333.

memorandum on the contract, aggregating less than \$300, and that Mrs. Thoms executed the quit-claim of her dower to Mr. Thoms' brother.

The original petition sets up this contract, as the basis of affirmative relief, and alleges that in making it the wife was represented by counsel, upon whose advice she acted; that said counsel investigated his financial condition, and that the amount of said payments and other considerations were named and exacted by them as commensurate with her needs and her inchoate right of dower.

Upon demurrer, the court below, upon the doctrine of liberal construction, held this to be the equivalent of an allegation that the contract was in itself fair, just and right.

The answer admits the execution of the contract, and of the quit-claim deed; but pleads gross inadequacy of consideration for the quit-claim as disproportionate to the husband's means, and fraudulent inducement to its execution by reason of her inexperience and reliance upon the misrepresentations of the husband.

The issues thus presented challenge the adequacy and fairness of the consideration for the release of dower involved in the contract; and the suit is in one aspect for the specific enforcement of the contract against the wife, by way of estoppel.

This was substantially the ruling of the court below, which held upon demurrer to the petition, that the quit-claim conveyance of dower made by Mrs. Thoms, pursuant to the contract, was a nullity; but that, nevertheless, the contract, construed as a covenant not to assert a contingent dower claim, would be binding, if fair and reasonable and upon proper consideration.

The trial court bases its final decree for the plaintiff below upon findings of defendant's delay in asserting her claim to dower and consequent lack of equity in her defense, and the change of plaintiff's position since the contract was made; and, lastly, a general finding that the defendant (the wife) did not have any estate by way of inchoate right of dower or otherwise, in the property described in the petition; but the court expressly negatives

any finding upon the inadequacy of the settlement between the parties.

These actions being excepted to are now brought before us by the petition in error for review upon a full bill of evidence.

The quit-claim deed purporting to convey the inchoate right of dower to a third party, not the husband's grantee of title, was undoubtedly void, as a conveyance, upon well-established principles. The inchoate dower right of a wife is an incident of the seizin of the husband, and can only be conveyed by the wife in connection with his own transfer of title. *Weaver v. Gregg*, 6 O. St., 547 (553).

It is, though inchoate, an interest in the land created and vested in her by law for her benefit, and capable of alienation only in the mode provided by statute; and this limitation inheres in the nature of the estate itself. *Miller's Adm'r v. Woodman*, 14 O., 518 (521); *Douglas v. McCoy*, 5 O., 527 (where it is said: "The law will not permit the alienation of such possible contingent interests"); *McArthur v. Franklin*, 16 O. S., 193; *Black v. Kuhlman*, 30 O. S., 196; *Rosenthal v. Mayhugh*, 33 O. S., 155.

The contention of the defendant in error here is that, conceding the invalidity of the conveyance made by the wife, yet the contract pursuant to which the deed was executed, evidenced her intention to convey; and that the court should give effect to such intention by way of estoppel.

Can the court give effect indirectly through the medium of estoppel to a contract which the law prohibits?

It is a recognized rule in equity, that the void contract of a person under disability can not be made good by estoppel. The reason assigned for the rule is that as no remedy could be had upon the void deed of conveyance, it would be against the policy of the law to allow the same result to be reached through the indirect medium of estoppel. *Bispham's Equity*, Section 293.

It is true that the common law disability of the wife to contract does not now exist in Ohio; but as we have already shown, the disability of the married woman to alienate her contingent right of dower is one that is inherent in the na-

ture of the dower interest; so that the rule cited has application.

But, apart from the difficulty arising upon grounds of public policy cited, it is at least doubtful whether the doctrine of laches can be invoked as a basis of estoppel against an inchoate and contingent right of dower under the circumstances of this case.

It is well settled that estoppel can not be predicated upon ante-nuptial contracts.

This rule was applied in 27 O. St., 50, *Grogan v. Garrison*, affirming the decision of this court upon an ante-nuptial contract, and deed of settlement executed in conformity therewith, and intended to be effective as a jointure in lieu of dower. Three years after the husband's death, the widow filed her petition against the heir to have dower set off. Being reserved to the General Term, this court found that the deed of settlement was void and that no estoppel existed by virtue of the contract, to bar the widow's claim.

But in the case of *Rosenthal v. Mayhugh*, *supra*, our Supreme Court supports its action upon the authority of *Bullock v. Griffin* (1 Strobhart's Equity Rep., 60), which was upon a post-nuptial contract and conveyance of dower and an attempt to repudiate it by suit against the purchaser of the estate for dower, seven or eight years after the husband's death. It was there held that laches by failure to assert the right for years after it had become absolute by death of the husband, together with the retention of the consideration during and after coverture, may call into operation the doctrine of estoppel.

But this case, as also that of *Rosenthal v. Mayhugh*, furnishes authority, at least by implication, for the correlative doctrine that laches can be predicated only upon a right capable of assertion—a dower right, for example, rendered absolute by the husband's death. In the *Rosenthal* case the court says:

"A widow before dower is assigned, having only a vested right to be endowed, can not at law, convey such right—she can only release it. Yet, being a *femme sole*, she can

effectively bar such right by way of estoppel. Being a *femme sole*, equity will treat her as such and enforce her contracts in relation to her unassigned dower where she has estopped herself by her acts or contracts" (p. 167).

But we are clearly of opinion that whatever force *per se* may exist in equitable defenses of this character, their practical application must depend at last upon the fairness and equity of the transactions out of which they grew. While post-nuptial contracts of separation are recognized in Ohio, the rule is well established that neither husband nor wife will be aided in the enforcement of claims arising out of them if the contracts "bear the appearance of irregularity or unfairness." *Bettle v. Wilson*, 14 O., 257, citing 2d Story's Equity, Sections 652-654.

This rule is reiterated later with the requirement that the contract must be "reasonable in itself and fairly made between husband and wife." *Thomas v. Brown et al*, 10 O. St., 247. Still later in *Garver, Exr., v. Miller*, 16 O. St., 528, these conditions are emphasized, and the court says:

"It is essential that the terms of the contract shall be fair, reasonable and just to the wife, in view of all the circumstances of the case and of the parties, at the time the contract was made. If it becomes a question of facts, the proof must lead the mind of the chancellor satisfactorily to the same conclusion. In addition to this, facts must be averred or proved, or both, as the exigencies of the case require, showing that the terms of the contract in favor of the wife were fair, reasonable and equitable under the circumstances of the parties at the time it was made. And this doctrine runs through all the cases bearing on the subject."

These cases are but reiterations of the ancient doctrine of equity, that heirs and reversioners were supposed, in the eye of the law, to be so liable to impositions and to be so exposed to chances of being induced to make hard and unfair agreements touching the disposition of their expectant interests that, as a matter of policy, the rule is laid

down that he who deals with them has cast upon him the burden of showing that the purchase was a fair one and the price paid a reasonable sum and of the full value. *Perry on Trusts*, Section 220 (and cases cited).

In the light of these authorities, and in view of the evident purpose of the law in relation to the rights of women, based upon the marital relation, it seems to us evident that the rights of the parties here, if not concluded by the consideration first above mentioned, can only be adjudicated upon a careful inquiry into the actual fairness of the contract itself. The trial court expressly refused this; preferring to rest the judgment upon other grounds. But, as the entire record is before us, showing all the facts necessary, and as this question has been fully argued before us by counsel for both parties, we feel no hesitancy in proceeding to its determination.

The contract in question purported to cover not only the contingent dower interest of the wife, but also all claim for support during coverture, and her contingent distributive share in the personal estate. She was also to assume the husband's burden of expense, care and maintenance of their minor child for three years.

The consideration for all this was to be monthly payments of \$100 each, for the space of three years following the date of the contract.

It is incumbent upon the husband, who brings this contract into court as the basis of his prayer for affirmative relief, not only to establish its legality, but to "aver and prove that the terms of the contract in favor of the wife are fair, reasonable, and equitable under the circumstances of the parties at the time it was made." *Garver, Exr., v. Miller, supra*.

It is obvious that the consideration for such a contract should include a fair and reasonable present equivalent for the surrender of the several rights (1) of maintenance during coverture, (2) distributive share in the ultimate personal estate; (3) dower in real estate; and in the contract in question there should have been an additional amount for the support of the infant for three years.

The oral testimony of Mr. Thoms, and his letters, constitute the only evidence bearing upon his financial condition and style of living at and up to the date of the contract. But it shows that he was then the owner of property in Cincinnati, producing a rental income approximating \$5,000 per year; that when keeping house, he paid house rent of \$100 per month; with a furniture equipment costing about \$5,000 or \$6,000, and that they subsequently rented their house, furnished, to others for \$150 per month and lived at the Hotel Alms until about the date of the contract.

Mr. Thoms makes no satisfactory showing of his actual means, but places valuations on the real estate described in the petition, and subtracts the mortgage debts, and on this basis his counsel figures the dower interest, which we quote from the brief before us as follows:

"Therefore, according to the mortality tables (Giauque & McClure's present-value tables), Mrs. Thoms' inchoate right of dower in the Main street property would have been \$2,145.95. Her interest in the equity in the \$15,000 on the Fifth street property would have been \$1,287.60. Her interest in the other real estate has been fixed by the Common Pleas Court at \$227.60."

Counsel then concedes a dower value in the Walnut street stable property of \$1,296.09 and admit a total present value of \$4,957.24 for the dower interest; and claim that the \$3,600 paid under the contract, together with \$1,400 realized by Mrs. Thoms by sale of the furniture, about equaled this amount and was therefore a fair consideration for the contract.

But this presentation, besides entirely ignoring the other elements entering into the consideration of the contract, as measured against the terms, estimates the dower interest simply upon the basis of residual value of the estate after deducting the face of the mortgages. This, however, is erroneous under the Ohio rule established in *Mandel v. McClure*, 46 O. S., 407 (overruling *Bank v. Hinton*, 21 O. St., 507), which holds the release of dower in connection with the husband's mortgage to be a pledge of her contingent dower right to the mortgagee or his privies alone, for

the mortgage debt, and that in case of sale under the mortgage, the ascertained value of her contingent right of dower in the entire proceeds of sale is to be satisfied out of the balance left after payment of the mortgage debt before further distribution.

Without attempting here to recast the figures on the correct basis, it is sufficient to note that the value of the contingent dower right in question under the rule of law shown, is largely in excess of that figured by counsel, perhaps more than double; and if, from the \$5,000 claimed to have been paid as the consideration, we deduct the proceeds of the furniture which Mr. Thoms admitted giving to his wife about three years prior to the contract, the discrepancy is still greater.

We are of opinion, therefore, that the defendant in error has not met the requirements of proof on this point, and that the consideration was not fair and equitable to the wife under the circumstances. Neither do we think that the acts or omissions of his former wife in connection with the contract or any obligations growing out of it, had any such relation to the re-marriage of Mr. Thoms as to constitute an estoppel by conduct. The change of Mr. Thoms' position in this regard seems to have been entirely voluntary, and it is difficult to see how he could have been in any way deceived into taking this new step by any act or failure to act on the part of the wife.

There can be no fraud where all parties are equally informed of the facts and mutually assent to them. It is essential to an estoppel of this kind that the conduct on which it is based must actually have been the inducing cause for the action of the party who seeks to set it up. Bispham's Equity, Sections 289-291.

Mere silence and the mere retention of a sum paid, which she has practically accepted in lieu of all claim for alimony, and which in fact was a mere monthly stipend for a limited time to an amount not exceeding what she would have fairly been entitled to for maintenance of herself and child for that period alone if no contract had been made, can not, we think, bar her rights in respect of dower. In

fact, the entire consideration paid might be regarded as fairly applicable to and absorbed by the claims other than dower, leaving nothing whatever applicable to the dower interest. But even considered as applicable wholly to the dower claim, which manifestly was not the intention of the contract, as seems to have been assumed in the argument of defendant in error, the payment made falls distinctly short of a fair and reasonable equivalent.

We do not regard the divorce obtained by Mr. Thoms in Dakota as an element affecting the issues here under Ohio Statutes and decisions.

Upon consideration of the whole case, we are of opinion that the judgment below should be reversed, and it is so ordered.

Proceeding to render such judgment as the court below should have rendered (*Stein v. Rose*, 17 Ohio St., 471), we find that the plaintiff is not entitled to the relief prayed for, and judgment will be entered, dismissing the action at his costs.

Gordon, Granger & Dewitt, for plaintiff in error.
Bromwell & Bruce, for defendant in error.

CINCINNATI TRACTION COMPANY V. FORREST.*

1. Where the evidence was conflicting as to whether or not plaintiff, who was a passenger on an interurban railway car, stepped off the car before it came to a stop, and thereby contributed to her injury, a finding by the jury in favor of plaintiff will not be disturbed.
2. Where, in an action by a passenger against an interurban railway

(*This case was reversed in 74 O St —, but upon grounds not herein referred to, thereby inferentially approving the above)

company, the evidence of plaintiff shows that the car had stopped in response to her signal, and, while she was in the act of alighting, she was violently thrown to the ground by the negligent starting of the car; and there was also conflicting evidence tending to show that she stepped off before the car had come to a stop, which was claimed by defendant as showing contributory negligence *per se*; a charge to the jury, in such case that if they found from the evidence that plaintiff, on her own motion, had stepped off the car while it was moving so fast as to render such act dangerous, she was not exercising ordinary care and could not recover, is not erroneous.

Error to special term.

HOSEA, J.; HOFFHEIMER and CALDWELL, JJ., concur.

The plaintiff below based her right to recover upon the alleged fact that the car had stopped in response to her signal, and, while she was in the act of alighting, she was violently thrown to the ground by the negligent starting of the car, and offered evidence to this effect.

There was also conflicting evidence tending to show that she stepped off before the car had come to a stop, and it is claimed in argument, that this fact, assumed to be established by the weight of evidence, constituted negligence *per se*, and bars recovery.

Upon this theory, the plaintiff in error complains of the following charge, as prejudicial error:

" * * * and if the jury should find from the testimony in this case, that, on her own motion, the plaintiff stepped off the car while it was moving so fast as to render that act dangerous, the plaintiff was not exercising ordinary care, and, contributing thus to the injury, can not recover.

So far as concerns this charge, *per se* we think it does not involve error, upon the authorities cited by counsel, and under the principle announced by our Supreme Court in *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St., 153, 155 (65 N. E. Rep., 877).

Had the verdict necessarily involved a finding of the facts, as claimed by the plaintiff in error, the pleadings could

have been amended to correspond, but the verdict is entirely consistent with the facts as claimed by defendant in error. The evidence being conflicting, it was entirely within the province of the jury to determine which version they should adopt.

From an examination of the record, we find no error prejudicial to the defendant below, and consequently the judgment must be affirmed; and it is so ordered.

Kittredge & Wilby, for plaintiff.

C. W. Baker, for defendant in error.

WALSH ET AL V. RICHARDSON ET AL.

1. The doctrine of subrogation, originating in the equity of one secondarily liable (as a surety) who pays the debt and becomes thereby entitled to the benefits of any securities held by the creditor against the principal debtor is extended to one who is compelled to pay off a prior lien to protect his security, etc. The right can only be made effective by laying hold of dormant equities already existing.
2. The right can not be invoked in favor of a third party who pays off a judgment lien except upon an agreement that the judgment shall be assigned or kept on foot for his benefit and in such wise as to place him in the shoes of the judgment creditor so as to respond proportionably for any deficiencies upon sale under execution.
3. The mere loaning of money to a judgment debtor does not operate to transfer the lien even though so understood by the parties.
4. Fraud in the creation of the debt may inure to the benefit of an incumbrancer of one property who pays taxes upon another property as against a judgment creditor of the whole, as creating an equity for subrogation to the extent of the money thus paid.

HOSEA, J.

A residual question of some difficulty arises in this case upon the following facts:

The defendant, Richardson, claiming to have duly paid

off a mortgage given by him to the Cincinnati Savings & Loan Society, upon certain lots on Central avenue in Cincinnati (the County Records showing an apparent cancellation in due form), obtained a loan of \$5,000 from the Walnut Hills Savings & Loan Company, securing it by a mortgage upon the same property, representing it to be a first mortgage, excepting for the lien of a general personal judgment held by plaintiffs, and to the removal of which lien he applied \$1,692.84 of the money loaned—\$864.20 of said money being applied to reimburse the judgment creditor for taxes advanced, which were a lien on property on Colerain avenue, as appears by the following entry in this suit made July 18, 1901:

"Now come the plaintiffs and acknowledge that the defendant, Jacob J. Richardson, has paid to them \$864.80 in full for the amount due them for taxes advanced on the land described in the petition, with interest to July 17, 1901; and has also paid to them \$1,692.84 on account of the judgment and decree herein on the mortgage notes; leaving due thereon \$9,000, with interest thereon from July 17, 1901, payable semi-annually.

"By consent of plaintiffs the lien of said judgment is hereby postponed to the lien of a mortgage for \$5,000 made by Jacob J. Richardson and wife, and Jane Carey, to the Walnut Hills Savings & Loan Company, dated July 15, 1901, upon the following real estate in said county, viz:

"Lot 10, and parts of lots 9 and 11, in Morris and Gordon's subdivision, said property being 63 feet $7\frac{3}{4}$ inches front on the west side of Central avenue near Mohawk Bridge."

It subsequently transpired that the apparent cancellation of the mortgage on said described property, held by the Cincinnati Society, was a forgery, admitted by Richardson; and said mortgage was duly foreclosed and exhausted the property, leaving the mortgage of the Walnut Hills Company worthless.

Meanwhile, however, the residue of plaintiff's judgment was more than realized out of its mortgage security upon

the Colerain avenue lots, leaving a balance, claimed by the trustee in bankruptcy in behalf of general creditors of Richardson.

The Walnut Hills Building Association contests this, claiming to be subrogated to the rights and lien of the judgment creditor as against this fund, by virtue and to the extent of its payment as above set forth, which fund, in excess of the security, was realized by the sale.

It will be obvious that the two sums, viz.: the \$864.20 used to pay the taxes on the Colerain avenue lots, and the \$1,692.84 used to extinguish or postpone the lien of the judgment on the Central avenue lot, are quite distinct in the purview of the doctrine of subrogation, inasmuch as they have relation to different liens—one the lien of a mortgagee who advances taxes on the mortgaged property, and the other the lien of a personal judgment upon the estate of the debtor.

The doctrine of subrogation, originating in the equity of one secondarily liable (as a surety), who pays the debt and becomes thereby entitled to the benefits of any securities held by the creditor against the principal debtor, has been long applied in favor of a junior incumbrancer, who is compelled to pay off a prior lien to protect his security, or where a right of subrogation is acquired by fraud in the creation of the debt. The right can be made effective, however, only by laying hold of dormant equities already existing, for the court can not create new ones.

With respect to judgment liens paid off by a third party, however, the weight of authority seems to be that, except in case of an agreement that the judgment shall be assigned or kept on foot for the benefit of the party paying, the payment extinguishes the judgment, and consequently nothing remains through which subrogation can be worked out.

In *Sanford v. McClean*, 3 Paige Ch., 122, the principle is illustrated in a statement quoted in many later cases. The court says:

"If the complainant had actually advanced the money to pay off the judgment, it is doubtful whether he would have

been equitably entitled to be substituted in the place without some conventional arrangement with those creditors. It is only in cases where the person advancing the money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in place of the creditor as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor which is paid with the money of another and without any agreement that the security shall be assigned or kept on foot for the benefit of a third person, is absolutely extinguished."

The foregoing language is quoted, *in haec verba*, in 1 Sanford's Ch., 385, *Banta v. Garmo et al*, where the facts are somewhat analogous to those at bar.

B loaned money to A, to pay off a prior mortgage, and himself took a mortgage to secure payment. The first mortgage was duly canceled. An intervening judgment was levied on the land and sale had by the sheriff and the judgment entered satisfied of record—which entry misled the attorney of B. After date of the second mortgage the sheriff conveyed the property to the purchaser, and B claimed to be subrogated to the rights of the first mortgage as against the purchaser. The court says:

"The first mortgage was paid so far as the parties were concerned. No one would have thought of resuscitating it, but for discovery of defendant's title under the judgment. * * * The attempt is now made to subrogate the complainant to the rights which the first mortgagee had and thus give him a lien prior to defendant's. * * * A further argument is made in behalf of complainant on the ground of mistake in canceling the prior mortgage. * * * The mistake consisted in the belief that complainant was acquiring an unincumbered title by his mortgage. This kind of mistake is of frequent occurrence, but I never heard of an instance in which the suffering lender was permitted to trace back his money into the hands of a stranger who had received it in discharge of an elder lien, than the one newly discovered, and thereupon to set up said stranger's lien to

overreach the intervening incumbrancer. * * * No case can be found where a third person, after voluntarily and intentionally discharging a lien in which he had no prior interest, and on the faith of another security, has been permitted, as against other incumbrances to revive such lien on ascertaining that his own security was worthless.

"And if the question were open, I would at once say that the evils which would flow from the adoption of such a principle, would overbalance the hardship of particular cases which occur under the rule of law, as now settled."

In 71 Tex., 596, *Terry v. O'Neal*, it is held that, except by an understanding between parties, whenever a judgment is to be kept in force for benefit of the party paying, payment will extinguish it. The court says:

"After the demand of Rogers (the judgment creditor) had been satisfied by Taylor, he had no interest to subserve by keeping the judgment in force; and it is evident he did not understand it was to be kept in force; for the security relied upon by him was the land conveyed to him by Rogers."

In *St. Francis Mill Co. v. Lugg*, 83 Mo., 476, a similar ruling is made, and the following statement is cited from Freeman on Executions, in the opinion:

"The voluntary payment of an amount due on judgment or execution, if made unconditionally and without reservation of right to keep the judgment alive, is unquestionably and irrevocably a satisfaction of the writ, no matter by whom payment is made." (Section 444.)

In *Swan v. Patterson*, 7 Md., 164, the point is made that the assignment, to be a valid basis of subrogation, must be such as to place the third party on an equality with the judgment creditor, so as to be required to respond proportionably for any deficiencies upon sale under execution. See, also, 194 Mich., 527, *Draper v. Ashley*, 35 Atl., 897, *Gove v. Bryan*.

The case of *Unger v. Leiter*, 32 O. St., 210, is in the same

line of principle, and seems to be conclusive as applied to the sum of \$1,692.84, paid upon the judgment. The first syllabus of the case is as follows:

"The mere loaning of money to a judgment debtor to be applied by him in part satisfaction of a judgment which is a lien upon the debtor's land, does not operate to transfer such lien in whole or in part to the lender, even though it was understood between the parties to the transaction that it should have that effect."

And also analogous principles were applied in a case of payment of notes in 63 O. St., 374.

Possibly a different question might have arisen, were the Central avenue lots still in possession of Richardson, and the claim made in respect of the judgment-lien upon that property, in view of the fraud of Richardson, whereby the loan was obtained. The fraud, however, had relation to the particular property and the *pro tanto* payment upon the judgment had reference only to relieving the lien of the judgment upon that property as though such lien were completely subdivided out of the general lien. The principle of subrogation enables the court to act only through dormant equities that inhere in the transaction itself, and can not be extended over a complete break in the chain of equitable sequence to include matters not in contemplation of the parties at the time. 135 Ala., 239, *Bigelow v. Scott*.

As to the claim of the \$1,692.84, therefore, the claim of the W. H. Co. must be denied.

As to the sum of \$864.20 applied to the taxes on the Cole-rain avenue lots, the claim to subrogation seems to rest upon a better foundation. Thus in *Bolman v. Lohman*, 74 Ala., 507, it is held that:

"The lender of money used in payment of a mortgage, or other incumbrance on land, is not entitled on that account alone to be subrogated to the rights of a mortgagee, but if advanced for this purpose with the just expectation of obtaining a valid security on the property for its repayment, or, if the mortgage given for its repayment is defective, or

the money was obtained by fraud and misrepresentation, the lender is subrogated to the security of the mortgage, which his money has discharged."

Similar principles are set forth in 39 Iowa, 651; 93 N. Y., 225; 32 N. J. Eq., 104.

In the present case, the money borrowed was used to pay off the taxes, which were a lien superior to plaintiff's judgment, on the land upon which the judgment was primarily secured, and by the sale of which the judgment was discharged and the fund now in court realized. The lien was re-created in plaintiff by his advances, and in respect of this lien, as it seems to me, the right of subrogation should be made effective in favor of the Walnut Hills Company by reason of the fraudulent misrepresentation of Richardson in securing the loan and the consequent worthlessness of the security given. The fund realized from the sale in excess of the judgment may fairly be attributed, *pro tanto*, to the payment of taxes, and therefore represents this borrowed money.

As to the sum of \$864.20, with interest from July 18, 1901 (the date of entry), the claim of the Walnut Hills Company will be allowed.

Counsel will submit entry in accordance with this opinion.

Thornton M. Hinkle, for plaintiff.

Pogue & Pogue, for defendant.

MARY MCCOY, ADMINISTRATRIX, v. THE CINCINNATI,
HAMILTON AND DAYTON RAILROAD COMPANY.*

Where a member of a wrecking crew, who has had long experience in that work, takes his seat in a dangerous place on a train about to proceed rapidly to a wreck, and is knocked off and killed through the negligent placing of a stick of timber upon the car, he is chargeable with notice of the danger of his position and of the manner in which the car was loaded, and the

* Affirming action of the trial judge Hosea in granting motion for nonsuit.

trial court is warranted in taking the suit of his administrator from the jury on the ground of contributory negligence.

FERRIS, J.; HOFFHEIMER, J., and CALDWELL, J., concur.

This action is brought to reverse the proceedings of the court in withdrawing the cause from the jury and rendering a judgment for the defendant. Numerous grounds are alleged for error, but the determination of what we regard as the principal question will serve to indicate the view of this court with reference to all of the various assignments of error as contained in the petition.

The plaintiff was the duly appointed administratrix of the estate of Patrick McCoy, who met his death on the 26th day of December, 1901, while engaged in the service of the defendant railroad company as a servant, employed under the direction of a foreman or wrecking master, whose duties required him to assist in the work of clearing the tracks in cases of wreck. The petition states that while so engaged as a workman, riding upon a wrecking train, he was by reason of the negligence of the defendant struck and knocked from said train, and met his death by reason of the negligent running and operation of said train; and by reason of the negligent manner in which a beam or pole was placed on said car, that it was caused to get out of place, and to project over and beyond the sides of the car, so that it came in contact with other cars on the adjoining track of the defendant company, and by reason thereof came in contact with said cars and, swinging around, struck the decedent, knocking him from the car, and causing him to fall to the ground, and under the cars, whereby he met his death. And it was charged in the petition that the beam or pole on said car was in a dangerous and unsafe condition; that it was carelessly placed in such a position as to become dangerous, and that the decedent did not know of its condition; and that the defendant could have known the situation by the exercise of ordinary care.

The petition stated a good cause of action. The essential material facts being traversed by the defendant, the case came on for trial, and the plaintiff, to maintain the issue

on her part, introduced certain witnesses, whose testimony had a tendency to prove the substantial facts alleged in the petition.

The evidence submitted to the jury showed that the decedent at the time of his death was a man experienced in railroad matters, called at the noonday hour, suddenly to proceed upon the wrecking train to Wyoming, a point along the line of the road where a wreck had occurred. McCoy, the decedent, took a position upon a flat or derrick car. The wrecking train consisted of a flat car, spoken of in the record as a "derrick car," upon which was carried a derrick and an extra set of trucks, some large blocks on the east side of the car, and two poles on the west or left-hand side of the car supported by two upright posts or standards on the edge of the car. The second car was a flat car, built like a box car, for carrying blocks used in wrecking, and is known as the "block car." A third car, called a "closed tool car," was provided, with steps and platforms at each end, and was partly used for carrying tools; was fitted up with a stove, and was provided with benches and cushions on the side for the comfort of the men, and was where the members of the wrecking crew usually rode (page 75 of the record).

On the date of the accident, the derrick car was loaded, having the push pole and the lever on the side of the car, with two stakes to hold them in place. All the members of the crew rode in or on the tool car, except McCoy, the decedent, who boarded the derrick car, and sat on the flange or tread of one of the wheels of the truck, located in the derrick car on the west or left-hand side of the car, with his feet to the side of the car (pages 36, 37, 38 and 50 of the record).

The record discloses also that three boys, aged about nineteen years, who were trespassers, also boarded the derrick car for a ride to the wreck. The testimony shows that they were seated facing the rear of the train on the axle attached to the wheel upon which McCoy was sitting. The train ran at a speed of probably twenty-five miles an hour, until it reached a point in Fairmount, when the only witness,

John Quigly, one of the boys who was sitting on the axle, saw a beam or pole come through the air from the side of the car where McCoy sat, striking the two boys sitting with him. That witness did not see McCoy struck, nor did he see him fall from the car, but on looking up after straightening the pole, saw that McCoy was not on the car (pages 39, 52 and 53 of the record). The two boys were found after the train had been brought to a stop, lying back on the bolster of the truck, and McCoy was found "with his head next to the rail of the track upon which the train was running, and his feet lying towards the track on the west" (page 44 of the record). From the position that McCoy occupied upon the tread or flange of the wheel, the pole referred to as the "push pole" on that side of the car, would be directly under his feet (page 90 of the record). And the record (pages 61 to 70) indicates that McCoy must have had his feet placed upon the pole, or that his feet were drawn up under him, resting on the axle box of the wheel.

The court below, finding that such facts failed to make a *prima facie* case in support of the allegations of negligence as contained in the petition, withdrew the matter from the consideration of the jury, and entered a verdict for the defendant, and, in so doing, the plaintiff alleges there was error that justifies the reviewing court in reversing the judgment.

That negligence is a mixed question of law and fact is not to be questioned. Nor is there any doubt that it becomes the duty of the court when the testimony of the plaintiff established contribution to the cause that produced the injury, it would be reversible error for the court to refuse to grant a motion of the character made in this case. It becomes necessary, therefore, to ascertain from the record whether the plaintiff, upon whom the burden of proof rested, had shown negligence on the part of the defendant and had shown himself free from fault. In accepting a position as a member of the wrecking crew, the plaintiff assumed the risks only that were ordinarily incident to his duties as a member of such crew; he did not assume any risk growing out of the improper operation of the train, or from improper

placing of any of the materials on the car, if the testimony should show that he was in no way concerned with the situation that produced the injury. This would not be so if the testimony would tend to establish the fact that he himself had placed the pole, which was alleged to have been the proximate cause of the injury, in a situation where, by the exercise of ordinary care, it would have remained stationary; for as between the master and servant, in a case of this character, the master would not be held responsible for the act of a servant who, in the performance of a duty, is charged with the exercise of care that would have prevented the happening of the injury. The risk which a servant under these circumstances assumes does not excuse the master from the exercise of ordinary care in the management of the train for the purposes had in view in the organization of the crew of which the decedent was a member. It could safely therefore be presumed that when the decedent accepted employment as a member of the wrecking crew, and having had experience as such, he became charged with the knowledge of the fact that the train would be operated in such a manner as to arrive at the place where the wreck occurred, at the earliest possible moment consistent with safety; and if, therefore, the accident was the result of the rapid movement of the train thus going, no recovery could be had. The decedent could not voluntarily assume a position of greater hazard, where there was a greater liability of being jostled off the car, and recover from the master as the result of a situation caused by his own carelessness. He must have been in the exercise of ordinary care at the time of the accident, and the burden of establishing this fact was upon the plaintiff. The court found, as a matter of law, that the plaintiff, having voluntarily chosen a position different from that assigned to members of the wrecking crew while in transit, and having taken a position upon the car not justified by any one charged with the duty of exercising ordinary care, was in law guilty of negligence, and therefore there was no case for the jury.

As bearing upon the situation developed by the testimony, it will be profitable to examine the authorities wherein the

courts have determined when negligence is a matter of law, and when it is a question of fact for the jury. It would be admitted that a railway company is bound to use ordinary care, diligence and skill for the purpose of protecting its servants from encountering unnecessary risks, but it is not bound to use any higher degree of care for this purpose (Shearman and Redfield on Negligence, 189). And ordinary care has been defined under such circumstances as are presented by the facts in the case at bar to mean such care as takes into consideration all of the exigencies of the particular service in which the parties engaged (24 Fed. Rep., 124).

The doctrine is well settled that a master employing servants for a dangerous business is bound to prescribe rules sufficient for orderly and safe management, and to keep his servants informed of these rules; and it has been held that a servant's violation of such rules known by him, or his acquiescence in their violation, amounts to contributory negligence, and no recovery can be had. This rule is adopted in the Knittal case, 33 O. S., 468. In such cases the courts have held that it was the duty of the employer to make suitable rules and regulations and bring them to the knowledge of the employes, and, when so done, the master's duty is terminated (Shearman & Redfield on Negligence, Secs. 202, 204). The servant from and after such time, failing to observe such reasonable rules and regulations, does so at his peril. If the testimony introduced discloses the fact that the injury was proximately due to the neglect of the servant, or a failure to obey orders, or by assuming a position of unusual hazard, he contributed to the injury, and therefore could not recover (9 U. S., 439; 62 N. Y., 251; 45 Iowa, 546). "On plain principles already fully stated, no recovery could be had against the master for injuries received * * * by a railroad servant from attempting to do his work in a method needlessly dangerous (Shearman & Redfield, Section 207-12; Ill. App., 639). The principle exempting masters from liability to servants for injuries caused by defective loading of cars, the facts of which were known to the servants or ought to have been known, is based upon the law of contributory negligence.

The case at bar presented to the trial judge a situation at the close of the testimony for plaintiff in which the servant was shown to have been experienced, had been connected with the business of the wrecking train for a long period of time, and therefore would be presumed to know "the conditions of the material, machinery or appliances, which he had a constant opportunity to inspect, and which his regular duties brought under his notice," and therefore was presumed to know the ordinary dangers and risks of the service (41 Ark., 542); and therefore knew or ought to have known that the caboose, prepared by the company as a suitable place for him to ride in safety, was the proper place for him to be located while the train was moving. And he should have known that sitting on the rim or tread of the wheel located on a derrick car, drawn rapidly, with his feet dangling down, was an improper place, involving hazard not incidentally connected with the service for which he was employed. The facts are not unlike those in 103 N. Y., 667; 113 Penn. St., 490; 59 Texas, 255.

If it be said that the proximate cause of this accident was the improper loading of the poles on the car, and that the injury was caused by the slipping of what is referred to in the testimony as the "push pole" so that it came in contact with the car on the adjoining track, and by reason thereof brushed the decedent from the car to his death, it would still be true that no recovery could be had, because of the defective manner of placing the pole in such a position, for "When circumstances make it the duty of the servant to inquire, it is contributory negligence on his part *not* to inquire. A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire" (Shearman & Redfield, Sec. 217).

But assuming that the proximate cause as shown by the testimony is not to be found in facts relating to the push pole, how could the responsibility be placed upon the company, based upon clear facts taken from the record? The

rule laid down by Justice Brewer in 179 U. S., 658, would then apply:

"It is not sufficient for the employe to show that the employer *may* have been guilty of negligence; the evidence must point to the fact that *he was*. Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half-dozen causes, and find that the negligence of the employer was the real cause, where there is no satisfactory foundation in the testimony for that conclusion."

We think the court was clearly right in placing the burden of proof upon the employe who sought to charge the employer with negligence, at the same time admitting the law to be that mere proof of the occurrence of an accident, does not discharge that burden. Nor do we believe that the doctrine of *res ipsa loquitur* is applicable to a cause of this character (132 Fed. Rep., 593). And we are also of the opinion that on the authority of 66 O. S., 509; 69 O. S., 142, that under the testimony the decedent assumed the risk incident to the service in which he was employed, and that having taken the position of unusual hazard in riding on the tread of the wheel, probably the most hazardous place on the car, he assumed thereby the risks incident to that perilous position, and therefore was not entitled to recover.

Our courts have left little room for reasonable doubt as to the duty of the court under the circumstances "where the testimony of the plaintiff raises a clear presumption of negligence on his part, which directly contributed to his injury, and where no testimony is offered by him tending to abut that presumption, it is the duty of the trial court to sustain a motion by the defendant made at the conclusion of the plaintiff's evidence, directing a verdict, and the refusal to sustain such motion is error" (69 O. S., 142). Judge Spear deciding that case, and quoting from the Elliott case, 28 O. S., 340, stated the rule to be that where the undisputed facts showed that by the exercise of ordinary care a party

might have avoided injury, he can not recover. And applying these rules to the testimony before the jury, we believe that the trial court, finding that there was no conflict of the evidence upon the essential facts, properly regarded it a question for the court.

We are of the opinion that this course was proper, and that the motion to arrest the case from the jury was fully justified by the record presented in this case.

Galvin & Galvin, for plaintiff.

Maxwell & Ramsey, contra.

AETNA LIFE INSURANCE CO. *v.* E. G. PENN.

Inasmuch as the interest of the beneficiary in a life insurance policy is a vested one which can not be impaired by any act of the insured, an action to rescind a policy and recover the premiums paid can not be maintained by the assured without the assent and concurrence of such beneficiary; *a fortiori*, when the beneficiary has brought suit to perpetuate testimony with a view to an action against the insurer at the maturity of the policy.

Error to special term.

HOSEA, J.; HOFFHEIMER and LITTLEFORD, JJ., concur.

The petition filed in the case below on December 15, 1886, by E. G. Penn, alleges, in substance, that:

On December 17, 1874, E. G. Penn, the defendant in error, secured a ten-year policy upon his life, in the Aetna Life Insurance Company, plaintiff in error, containing a provision for renewal at the end of that time; that all premiums having been paid, a new policy was issued to Penn, pursuant to the condition of the first policy, on December 26, 1884; that premiums were duly paid on the second policy until June 26, 1886, on which day Penn duly tendered the premium then due, which tender the company refused; and

the petition concludes with a prayer for \$8,000 damages and "such other and further relief as the court may deem meet."

The answer of the insurance company, filed March 12, 1887, admits the issue of the policy in December, 1884, and avers that said policy was issued for the benefit of Mary A. Penn, wife of said Elijah G. Penn, and her children by him, and that plaintiff has no interest therein. The answer sets up other defenses, in substance, that at the time of said tender the company was, by request of said Penn, investigating a charge of intemperance alleged against him, that, if true, would have invalidated the policy under a condition of the policy to that effect; and that subsequently said Penn was notified that the premium would be received as of the day when due, but said Penn declined to pay the same; that said company thereupon demanded payment of said installment of premium of said Penn, and of Mary A. Penn, who declined and failed to pay same; and that said policy has thereby become void; and denying any damage.

A reply was filed on January 4, 1904, seventeen years later, admitting that the policy of 1884 contained the provision as to intemperance as alleged in the answer, but denying all its other allegations.

Upon the hearing, the introduction of the policies showed that they were issued for the benefit of the wife and children. The court and parties seem to have treated the case, and it was tried throughout, as one for rescission with recovery of premiums paid, and a decree was entered accordingly on February 4, 1905, rescinding the contract under both policies, and finding the sum of \$5,225.94 due as the aggregate of the premiums paid, with interest to the first day of the term, January 2, 1905; and judgment was given for this amount with interest from the last mentioned date.

It will be seen, from the foregoing statement of the case, that the defendant's first defense, namely, that the policies the plaintiff, Elijah G. Penn, had no interest in the same, was in the nature of a plea in abatement. Revised Statutes, 4993, provides that suit shall be brought in the name of the real party in interest, except as provided in other sections which have no application here. Revised Statutes, 5006,

provides that persons who have an interest in the subject-matter of the action and in obtaining the relief demanded, may be joined as plaintiffs; and Revised Statutes, 5007, provides that those who are united in interest must be joined as plaintiffs or defendants.

The question, then, is, whether this action can be maintained in the name of Penn without joining the beneficiaries? The court below resolved the question in favor of Penn, plaintiff below. If this view was erroneous, the error was vital; and, as its determination lies at the threshold of any further consideration of the issues involved, we have given it careful consideration.

The rule is well established that the interest of beneficiaries in a life policy taken out for their benefit is a vested one, and can not be impaired by any act of the insured. This rule is accepted by text-writers and courts as inviolable.

As expressed in 2 Joyce, Insurance, Section 730:

"The weight of authority clearly supports the rule, that the beneficiary, under the ordinary life policy, has such a vested interest that the assured has no control of the disposal of the fund, except with the beneficiary's consent," and can not surrender without such consent. See Sec. 853; also Sec. 1659.

In 1 May, Insurance, Section 67, it is said:

"Cancellation can be had only by consent of parties, and when the life of one is insured for the benefit of another, the consent of the beneficiary must be obtained." See also Section 356.

A substantially similar statement of the law is to be found in 2 Bacon, Insurance, Section 376.

It is undoubtedly true, as a principle of general application, that the parties to an executory contract have a right to something more than that it shall be performed when the time arrives. They have a right to the maintenance of the contractual relation up to the time as well; and if one of the parties renounces it before that time, the other is en-

titled to elect whether he will accept or not accept the renunciation. *Perkins v. Fraser*, 107 La., 390 (31 So. Rep., 773); *Rochester v. De la Tour*, 2 Ell. & Bl., 678; *Frost v. Knight*, L. R. 7 Exch., 111; *Anson*, Contracts, 290; *Stephenson v. Cady*, 117 Mass., 6; *Rugg v. Moore*, 110 Pa. St., 236 (1 Atl. Rep., 320); *Paige*, Contracts, 1599.

These principles are well established as applicable to insurance contracts.

Insurance Co. v. Tullidge, 39 Ohio St., 240, holds that where the company wrongfully refuses to receive the premium, the beneficiary has an election of remedies:

- (1) To tender premiums until the policy matures and then sue upon the contract;
- (2) To treat the contract as at an end and sue for rescission and recovery of premiums paid; and,
- (3) To obtain a judgment continuing the policy in force.

The reason for requiring a rescission, as stated by 2 May, Insurance, Section 356, is, that the insured can not recover back the premiums paid and leave the question of liability on the policy open.

One of the principal references cited by Judge Okey for the holding in *Insurance Co. v. Tullidge*, *supra*, is the case of *Day v. Insurance Co.*, 45 Conn., 480 (29 Am. Rep., 693), wherein the same election of remedies is declared; but it is there also held that the concurrence of both parties is necessary to terminate the policy (page 497), and as the plaintiff sued upon breach of the implied contract by defendant to accept premiums and keep the policy alive, and sought to recover back the premiums paid without having elected to consider the policy at an end, thus leaving the question of defendant's liability open, the court ordered an arrest of judgment.

This point was further emphasized in *Day v. Insurance Co.*, *supra*, where it is said:

"Assuming that the defendants had no right to cancel the policy for the non-payment of the premium, the policy

remained a continuing contract in full force until the plaintiffs elected to treat it as rescinded."

If, therefore, the basis of the action to recover back premiums paid is the voluntary act of the insured in electing to treat the contract as rescinded, and if the insured can not surrender without the concurrence of the beneficiaries, such mutual concurrence is a condition precedent.

In Joyce, Insurance, Section 1651, under the head of Rescission, it is said:

"In determining the right of one whose life is assured for the benefit of another, the same principle is involved as in cases where the question arises as to the right to change a beneficiary, * * * but it may be stated here that except there be some right reserved in the contract, or unless the act be within the intent of some permissive statute, one whose life is insured for the benefit of another can not rescind or surrender the policy without the beneficiary's consent."

In line with this doctrine is the holding in *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St., 156, 163 (5 N. E. Rep., 417; 58 Am. Rep., 806), wherein Judge Spear says:

"Had the husband, independent of any relation as agent for the wife, power to surrender the policy? * * *

"There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone by the insured. * * * In the payment of premiums, he, in law, was her agent. * * * The relation of principal and agent implies trust, confidence. Here was antagonism, and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband not having any authority then, either by reason or having paid the premiums, or by his position as the insured in the policy, nor yet as agent

for the wife, to make a surrender, it follows that the attempted surrender of the policy was inoperative, and the rights of the beneficiary were not impaired by the attempt."

To the same effect is *Central Bank v. Hume*, 128 U. S., 195 (9 Sup. Ct. Rep., 41; 32 L. Ed. 370), wherein Chief Justice Fuller says, page 206:

"We think it can not be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself. * * * It is indeed the general rule that a policy and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any person the interest of the person named."

In *Trabandt v. Insurance Co.*, 131 Mass., 167, the policy was issued upon request of the husband, who paid the premiums, but the application was made out in the name of the wife by the agent—the parties not understanding English and not knowing what the paper contained. In the suit for premiums, a verdict was rendered for defense, which was confirmed by the supreme judicial court, which said:

"The contract of insurance was between defendant and the wife. Premiums were paid by the husband with her consent and on account of her policy. He incurred no responsibility to her by reason of such payments, was no party to her contract with defendant and suffered no injury from the invalidity of that contract. If any action can be maintained to recover the amount of the premiums so paid it must be in her name and not in his." Citing *North American Ins. Co. v. Wilson*, 111 Mass., 542.

To the same effect, see *Whitehead v. Insurance Co.*, 102

N. Y., 143 (6 N. E. Rep., 267; 55 Am. Rep., 787), wherein it is held that in a policy upon his life for the benefit of his wife and children, the husband in whatever he does in perfecting and continuing it, acts as their agent, and they acquire a vested interest in it upon delivery to insured, and that the husband has no authority without the assent of the assured to surrender the policy—such act not being within the scope of his authority. See also *Sticken v. Schmidt*, 64 Ohio St., 354, 359 (60 N. E. Rep., 561); *Foxhever v. Order of Red Cross*, 24 O. C. C., 56.

It would seem to be a fair deduction from these authorities that the wrongful refusal of the insurer to continue the policy in force can not be availed of in a suit to rescind the policy and recover premiums without the assent and concurrence of the beneficiaries. In the present case, there is not only no consent or concurrence shown, but such is negatived by the pendency of a suit by the wife to perpetuate testimony with a view to a suit against the company at the maturity of the policy upon death of the insured. It is manifest that as the basis of recovery of premiums is a judicial rescission of the contract grounded upon the concurring acts and assent of the company and the insured, such rescission would, if effective, destroy whatever right the beneficiaries may have in the policy. It is also manifest that such judgment could not be effective without the appearance of the beneficiaries in the suit as parties, and this for the reason expressed in 2 May, Insurance, Section 356, that the insured can not recover premiums paid and leave the question of liability of the company open.

Clearly upon these authorities the suit in its original form as an action at law for damages merely, could not be maintained, because in this form the pleader has mistaken his remedy. In such case, a judgment must fail upon motion to arrest, as in the case of *Day v. Insurance Co.*, 45 Conn., 480 (29 Am. Rep., 693), cited in *Insurance Co. v. Tullidge*, 39 Ohio St., 240. For a like reason the suit to rescind and recover premiums must fail because of lack of power in Penn, *solus*, to rescind or accept the forfeiture without the concurrence of the beneficiaries. Stated in another as-

pect, the plaintiff below failed in sustaining the burden of proof. He has pleaded a right alleged to be vested in himself, and the proof shows a right vested in himself and another jointly, which other is not a party.

It is true that a few cases are to be found that may seem to support a contrary view. Thus in *Universal Life Ins. Co. v. Cogbill*, 71 Va. (30 Gratt.), 72, it was held that upon the insolvency of the company the insured who paid the premiums and he alone had a right to demand return of the premiums and that the wife was not a necessary party; but here the failure was not the voluntary act of the company in seeking to abrogate the contract, but a failure of consideration through involuntary causes. In *New York Life Ins. Co. v. Bonner*, 11 Neb., 169 (7 N. W. Rep., 745), a somewhat similar ruling is based on a code provision similar to our Rev. Stat., 4995, authorizing suit by a person in whose name a contract is made for the benefit of a third person, but this would seem to be a misfit, because the authority given is obviously one simply to enforce the contract and not to rescind it. A third case, *Abell v. Insurance Co.*, 18 W. Va., 400, is based on the implied promise by the defendant upon rescinding the contract to return the money paid, *ex equo et bono*, to the insured—the implied promise being regarded as made with the party from whom it was received.

But it is apparent that these cases entirely ignore the important considerations upon which the modern and better considered cases and text statements of the law rest, and must be regarded as superseded thereby. If the conclusions we have reached are correct, it follows that the judgment below must be reversed, and it is so ordered, and proceeding to render the judgment that should have been rendered, judgment will be entered for defendant dismissing the petition with costs.

Judgment below reversed and judgment entered dismissing petition.

J. J. Muir and T. B. Paxton, for plaintiff in error.

Hicks & North and Louis Hicks, for defendant in error.

AETNA LIFE INSURANCE CO. v. ELIJAH J. PENN.

1. The insured and the beneficiary are both proper and necessary parties plaintiff to an action against an insurance company for the rescission of a policy and the recovery of premiums already paid.
2. Authority is conferred by the provisions of Rev. Stat., 5114, to remand an action by a policy holder for the rescission of his life insurance policy and the recovery of the premiums paid, for amendment by the addition of the beneficiary as a party plaintiff.
3. Laches in equitable proceedings is not a mere limitation of time but rests upon the inequity of permitting a claim to be enforced, and is founded upon some change in the condition or relation of the property or the parties and involving injury to the opposite party, through neglect to assert rights; a court of equity will not, therefore, deny relief to one who has slept on his rights, where it appears that the delay in prosecuting the suit has not worked any injury to the adverse party, but rather that a failure to examine the petitioner's claim would leave the defendant in the position of a wrongdoer who has profited by his own wrong and by the delay.

Motion to remand for amendment, by adding parties.

HOSEA, J.; HOFFHEIMER and LITTLEFORD, JJ., concurring

SUPPLEMENTAL OPINION.

The defendant in error, upon oral announcement of the court's opinion heretofore rendered (see *Aetna Life Ins. Co. v. Penn*, 16 Dec., 375), and before entry of judgment, moves the court, in accordance with the finding that the proper parties are not before it, to permit the beneficiaries to be made parties, and to remand the cause for this purpose. Counsel admits the correctness of the conclusions reached by the court as a matter of law, but claims that, as these go to the remedy only, the error of the plaintiff below in respect of the matters so found by this court are susceptible of correction within the statutory powers of the court, and that such correction is necessary in the interests of justice.

In the opinion heretofore filed, the defense that Penn was not the real party in interest, was treated as a plea in abatement based on defect of parties plaintiff; and the finding of the court, if entered as a judgment, would be in the nature of a non-suit as relating to the remedy and not to ultimate rights. Yet it is obvious, in view of the lapse of time since the beginning of the suit, that a dismissal without prejudice at this stage would, in effect, be fatal to the rights both of the insured and the beneficiaries. For this reason we have considered with care the power of the court to grant the relief asked, and its propriety as well.

The power of a court to authorize amendment in cases like that at bar is derived from Rev. Stat., 5114, which provides as follows: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or correcting a mistake * * * in any other respect, or by inserting allegations material to the case," etc.

The general spirit and purpose of this provision—as of the code generally—is indicated by Rev. Stat., 4948, which declares that "The provisions of this part, and all proceedings under it, will be liberally construed, in order to promote its object, and assist the parties in obtaining justice."

As early as *Irwin v. Bank*, 6 Ohio St., 81, the Supreme Court had occasion to define and emphasize the liberal spirit in which the provision under consideration was to be enforced, and said (page 87): "Prominent among the objects of the code was to prevent the rights of a suitor, or the merits of his cause, from being sacrificed to technical rules or to the omissions or mistakes of his attorney—hence the action of the code in regard to the correction of mistakes, before and after judgment."

In *Grant v. Ludlow*, 8 Ohio St., 1, it is said, page 32:

"It not unfrequently happens, especially in equity cases, that facts and allegations necessary to determine the subject-matter of the original cause of action, and dependent upon and growing out of the original cause of action, have been

omitted in the pleadings below, or the cause of action is improperly stated. Such amendments have been heretofore allowed on appeals in this state; and when the collateral facts, in equity suits, made it necessary to bring a new party in equity before the court, it has been allowed. Such amendments are made for the purpose of settling and fully determining the cause of action appealed."

In *Shamokin Bank v. Street*, 16 Ohio St., 1, 10, the expression is: "The general power of amendment given to the courts by the code, is very broad, and is only limited by the 'justice' of the case."

In *Neagley v. Jeffers*, 28 Ohio St., 90, 98, it is said: "The code provision is for the benefit of the party making a mistake, and authorizes the court, in furtherance of justice, to permit him to add or strike out the name of a party."

In *Morgan v. Spangler*, 20 Ohio St., 38, new parties were allowed "to be made because they were necessary parties to a full determination of the actual controversy."

In *Henry v. Jeans*, 48 Ohio St., 443 (28 N. E. Rep., 672), is again affirmed the "power to make new parties after judgment to prevent a failure of justice."

In *Second Nat. Bank v. Moderwell*, 59 Ohio St., 221 (52 N. E. Rep., 194), the court again characterizes the power of amendment under the code as "very broad."

These are a few of many cases wherein the Supreme Court has construed the code provision and applies the same even in cases before it for decision. Indeed, so late as *Cin., H. & D. Ry. v. Bailey*, 70 Ohio St., 88 (70 N. E. Rep., 900), that tribunal declares the code provision in question "especially applicable" with "respect to questions of practice in reviewing courts," and says that (page 91): "Since the section" (Rev. Stat., 5114) "authorizes the amendment of proceedings with respect to substantial defects, no inference against the right to amend can be drawn from the dismissal of petitions substantially defective, when no application was made for leave to amend."

And in *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St., 414 (69 N. E. Rep., 738), the substitution of a new plaintiff after answer was filed, was upheld, on the ground of being

the real party in interest with the reason assigned that the section "provides most liberally for amendment by adding or striking out the name of a party," etc., on terms.

In view of the construction thus placed by our highest tribunal upon the statute, giving power to the courts in matters of amendment, we entertain no doubt of our power in the premises. The question of the propriety of its application remains to be considered.

As already shown, the mistake of a party or his counsel as to legal rights, is within the remedial purpose of the code, if the amendment does not change the cause of action. The error of the plaintiff below in the present case, is one which is not obvious, but, as our former opinion indicates, is only to be ascertained by a careful comparison and analysis of authorities, some of which were subsequent to the filing of this suit. The issue set up by the defendant below—namely, that the beneficiaries alone were the proper plaintiffs—probably involves an error equally great, since the question has never been directly determined in Ohio, and other authorities are at variance.

On principle it would seem that the interest of the beneficiary, being in the contract and relating to its enforcement, must cease when by consent of the beneficiary the contract is rescinded. The recovery of premiums, in this view, is upon the implied obligation, *ex quo et bono*, arising upon the repudiation of its contract by the insurance company, and this implied obligation apparently goes to the party paying. *Abell v. Insurance Co.*, 18 W. Va., 400; *Trabandt v. Insurance Co.*, 131 Mass., 167.

The premiums in such case are but purchase money paid upon an executory contract to deliver.

In this view, therefore, the beneficiaries are necessary parties simply for the purpose of consenting to the rescission of the contract in order that the liability of the company may not remain open. May, Insurance, Section 356.

There are dicta, as in *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St., 156 (5 N. E. Rep., 417; 58 Am. Rep., 806), where the court refers, *passim*, to premiums paid by a husband on a policy in favor of the wife, as paid by him in the

capacity of "agent," but these cases will be found generally to refer to policies issued directly to the wife upon the life of the husband, upon her application. Such also were the cases in *Central Nat. Bank v. Hume*, 128 U. S., 195 (9 Sup. Ct. Rep., 41; 32 L. Ed., 370), and *Trabandt v. Insurance Co.*, 131 Mass., 167, cited in the former opinion. They are, in fact, contracts with the beneficiary; but in the case at bar the contract was made with the husband, and he could in no proper sense be regarded as an agent of the beneficiaries, because he paid his own money as the consideration of the contract made with himself by the company.

We therefore see no reason to doubt the correctness of our former conclusion, that both the insured and the beneficiaries are necessary parties, and that the position taken by the company below was equally erroneous with that taken by the insured. The motion of the defendant in error to be permitted to add the beneficiaries, is therefore correctly framed in this respect.

The question of propriety in granting leave involves, however, the further and vital consideration of justice. That it is necessary in order to save rights to the insured and beneficiaries has been shown; and while under many circumstances such relief would be refused, because of such delay as appears in this case, yet whatever laches may be imputed to the insured in bringing on the cause for hearing is imputable with equal cogency to the company, who set up no defense of laches in the court below. *Emmitt v. Brophy*, 42 Ohio St., 82, 89.

But laches in equitable proceedings is not a mere limitation of time, but rests upon the inequity of permitting the claim to be enforced, founded upon some change in the condition or relation of the property or the parties, *Galliher v. Caldwell*, 145 U. S., 368 (12 Sup. Ct. Rep., 873; 36 L. Ed., 739), and involving injury to the opposite party through neglect to assert rights. *Ripley v. Seligman*, 88 Mich., 177 (50 N. W. Rep., 173).

Nothing appears in this case to indicate that the delay in prosecuting the suit has worked any injury, and we are disposed, therefore, not to apply the rule, in view of the fact

that if the main contention of the defendant in error be sound, the company is in the attitude of withholding money justly due, and so far from being injured by delay, has been benefited rather by prolonging it.

And this brings us to the final consideration of the bald justice involved in the present application. To refuse the application and thus defeat the claim without examination of the merits, leaves the company—if the claim asserted be just—in the attitude of a wrongdoer, who, having been paid *pro tanto* the purchase money upon a contract to deliver, wrongfully refused to deliver the thing contracted for and yet retains the money paid. The statement of the proposition is sufficient to show that to permit this would be gross injustice. The effect, however, of granting the motion will bring into consideration the merits of the cause, and this can not be harmful.

Upon the whole case as thus reconsidered, we think the motion should be granted. The concluding order of the former opinion dismissing the cause will be revoked and the cause remanded to special term, with directions to amend by adding new parties and by amending allegations to correspond, and the further hearing and consideration of the cause continued until the next ensuing general term. This leave is granted upon the terms of payment by the defendant in error of all accrued and accruing costs of the suit at special and at this general term, and a mandate will be sent to the court below in accordance herewith.

J. J. Muir and T. B. Paxton, for plaintiff in error.

Louis Hicks and Hicks & North, for defendant in error.

COLUMBUS L. CLARK v. GEORGIANA CLARK.

The dissensions of parents do not release the father from the obligation to support his children, and the fact that he has obtained a decree of divorce in another state, after a separation which continued for many years, does not bar recovery by the wife from him of money expended in the support of their children prior to the granting of the decree; nor can aggression on her part be inferred as a matter affecting the rights of children, where the decree assigns no cause for the divorce and makes no provision for alimony or for the children.

HOSEA, J.; HOFFHEIMER and SWING, JJ., concur.

The action below was twice tried—the first trial resulting in a disagreement of the jury, and the second in a verdict for the plaintiff below, upon which judgment was entered; and the present proceedings are to reverse said judgment for errors alleged.

The facts, in brief, as appear from the record, are these: The parties were married in 1879, and after the birth of three children, to-wit, in 1884, they became separated and thereafter lived apart. The testimony was conflicting as to whose initiative was the cause of separation, but the verdict may be said to imply the husband's fault in this regard; and there is no charge of error as to the action of the jury upon the weight of evidence. Nor do we, upon a careful reading of the record, perceive any error of the court in giving or refusing to give the special charges asked, nor in the general charge; nor in other actions of the court as to which errors are charged.

The principal contest in the argument here arises upon divorce proceedings resulting in a decree of divorce granted by the Kentucky courts upon the petition of the husband. It is claimed that this is for the "aggression" of the wife, and that in consequence she can not recover under the Ohio rule, which is claimed in substance to be that the only circumstances under which the mother can recover from the

father money expended in rearing a child, is when she is divorced for his aggression and the custody of the child is awarded to her. The cases of *Pretzinger v. Pretzinger*, 54 O. S., 452, and *Fulton v. Fulton*, 52 O. S., 228, are cited in support of this contention. But these authorities apply to relations existing after divorce and not before.

The syllabus of the Pretzinger case shows its inapplicability to the case in hand, viz.:

"The obligation of the father to provide reasonably for the support of his minor child until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo* on account of the husband's misconduct, gives her the care and nurture of the child, etc."

In the case at bar the parties separated in 1884; and whatever the cause, it is clear from the testimony that the husband made no definite effort to provide a home for his family, nor did he offer to relieve the mother of the burden of nurturing and educating the younger children who remained with her. The boy in question (Stewart), who was a baby in 1884, began earning wages in 1899, at the age of fourteen and a half years. In January, 1900, the divorce was granted on the husband's petition, under a law of Kentucky making a separation of five years a sufficient cause. The decree assigns no cause and makes no provision for alimony or for the children. Under such circumstances "aggression" can not be inferred as a matter affecting the rights of the children. But be that as it may, prior to 1900 there was a period of about fifteen years during which the husband contributed nothing to the support of either his wife or the child. The amount awarded by the jury averages about two dollars and sixty cents a week for the period of the child's life prior to the earning of wages and prior to the divorce of the parents.

The Fulton case presents an application of the same principle adopted in the Pretzinger case. Both cases rest upon the relations of parents to children *after* a divorce, and have no application to relations preceding that event.

The obligation of the husband to support his family while

the marriage subsists is inherent in that relation. The dissensions of parents do not release the obligation of the father to his children, although the helpless dependence of a child may require the mother's custody rather than that of the father when parents live apart. If he choose to accept the continuance of such a condition as years go by, and makes no effort to assert his more direct responsibility, he may waive the right to the comfort of the society of the child and still be liable for support so long as the necessity therefor exists.

We find no error in the present case, and the judgment must be affirmed.

E. M. Ballard, for plaintiff in error.

Bates & Meyer, for defendant in error.

JOSEPHINE BATES V. WINIFREDE COAL CO.

1. A conveyance of land in trust without discretionary control in trustee, but reserving to the *cestui que trust*, during his natural life, the right to collect and receive all rents, issues and profits, paying all taxes and repairs, and the right of appointment of his successor, and, in default thereof, for the use and benefit of his heirs forever, creates, by the rule in Shelley's case, an equitable estate in fee.
2. A *cestui que trust* holding an equitable estate in fee with power of appointment, who conveys his interest by deed through a third party, to take effect *in futuro*, has exercised his power of appointment.
3. Where a lessee has assigned his interest in a perpetual lease and such assignee takes possession and pays rent to the reversioner under such assignment, the assignee has by so doing attorned to the reversioner and is estopped to deny his title.
4. A conveyance of a perpetual lease by the reversioner reserving a life estate in the reversion to the grantor, where the lease has been duly recorded, it is not a breach of the covenant for quiet enjoyment by the tenant, as such record is notice to the grantee who is bound thereby.
5. The statute of 32 Henry VIII, C. 34, which extended privity of

contract from reversioner to reversioner, and gave the right to sue in covenant in actions by or against assignees, is not in force in Ohio. Its place, however, is supplied by the code action by the real party in interest, which, for the purpose of enforcing an equitable liability against an assignee, consequent on notice, may be regarded as an equitable proceeding, and may be employed to recover installments of rent due on a lease.

6. A conveyance of his interest in a perpetual lease by a lessee by warranty deed, subject to all terms, stipulations, covenants and agreements thereof, "all of which grantee assumes," with acceptance of same by the grantee and taking possession thereunder, amounts in equity to a contract by the grantee to perform all the covenants of the lessee. Such grantee is not discharged from liability under such an equitable contract by mere assignment of his interest.
7. The grantee in a conveyance by warranty deed of a lessee's interest in a perpetual lease, who has accepted the same and taken possession thereunder, stands in equity as a surety to his assignee, and the lessor or his successor in interest may proceed against either such grantee or his assignee for breach of covenant to pay rent.

Reserved from special term.

HOSEA, J.; FERRIS and HOFFHEIMER, JJ., concur.

This is an action of assumpsit to recover installments of rent, brought against an assignee (by mesne assignments) of the original lessee, of a lease of lands for ninety-nine years, renewable forever.

The material facts are as follows:

(A) TITLE OF LESSEE.

(1) In July, 1850, Catherine McFarland, owner in fee of the lands in question, deeded to John F. McFarland and his heirs forever, upon the following trust:

"In trust nevertheless to permit and suffer her son, the said Isaac McFarland, only for his sole use and personal benefit, to draw, receive, and collect the rents, issues and profits arising therefrom, he paying the taxes and repairs,

during his natural life, and to and for no other purpose whatever; and for such other uses and purposes after his death, as he by deed or last will and testament duly executed shall or may direct and declare forever; and in default thereof, for the use and benefit of his heirs at law and their heirs forever; and in trust not to permit or suffer the said premises to be diverted from the uses and purposes intended, under any circumstances whatever."

(2) In October, 1876, John McFarland, trustee, together with Isaac McFarland, *cestui*, and his wife, Josephine, executed to Arthur W. Ross, his heirs, executors, administrators and assigns, for ninety-nine years renewable forever an indenture of lease, of the same lands, upon covenants for an annual rental of \$1,500 until 1878, and thereafter of \$1,800, payable in monthly installments of \$150, lessee paying all taxes and assessments and to keep buildings insured for \$2,000, with covenants for forfeiture and re-entry upon ten days' default in rental or other covenants. (Recorded in lease book 57, page 68, Ham. Co. Rec.)

(3) Arthur Ross dying, a decree of the probate court, *in re* estate of same, was entered, directing the conveyance, by his administrator, of all real estate shown in the inventory of partnership assets, to the surviving partners; and thereupon, John A. Porter, administrator, on January 25, 1883, conveyed to Addison Lysle and George Lysle, surviving partners, their heirs and assigns, by quitclaim deed, the property in question, said deed containing the following:

"All of said property herein described is now conveyed, subject to the terms, agreements, conditions and stipulations in said leases as above contained, to which reference is hereby made;" together with a specific reference to the lease and the record of the same.

(4) On April 1, 1885, Addison and George Lysle entered into an agreement with the Winifrede Coal Company, the defendant here, to sell and convey several leasehold estates, including that in question, subject to all rentals and taxes to accrue thereafter—deeds to be "warranty deeds free from incumbrance except rents and taxes to accrue,"

as set forth; vendors to procure assent of lessors where leases require.

On the same day the Lysles, with their wives, executed a general warranty deed of the leasehold estate in question, concluding the description as follows:

"The property described above is held by the grantors under and by virtue of a certain lease made by John McFarland, trustee, and others, to Arthur W. Ross, of date October 19, 1876, for the term of ninety-nine years, renewable forever; said lease recorded in book 57, page 68, of the real estate records of Hamilton county, Ohio, and this conveyance is made subject to all the terms, stipulations, covenants and agreements of said lease, as therein contained, all of which the grantee assumes."

(5) On June 16, 1902, the Winifrede Coal Company, by quitclaim deed, conveyed the property in question to John T. Nielsen, no reference being made to any covenants. It is admitted that Nielsen is an employe of defendant and that no consideration was paid therefor. No rent has been paid by Nielsen and plaintiff has refused to recognize him as tenant.

(B) TITLE OF LESSOR.

(1) Same as No. 1, *ante*.

(2) In 1878, Isaac McFarland, "for the purpose of vesting the reversion in my" (his) "wife, to take effect upon my" (his) "death," quitclaimed to Henry M. Cist, who immediately quitclaimed to Josephine, wife of Isaac McFarland, both these deeds referring to the trust deed to John McFarland and reciting that they are intended to be in effect one instrument, "being executed in pursuance of the provision in said (trust) deed authorizing Isaac McFarland by his deed to direct and declare how the property may descend after his death—the purport of which being to convey in fee simple, said conveyance to take effect on the death of Isaac McFarland."

(3) In 1882, Isaac McFarland died, leaving all his property by will to his wife, Josephine; a daughter Catherine—afterward Mrs. B. M. Cox—survived.

(4) In 1893, Josephine Bates, the present plaintiff, conveyed to her daughter, Mrs. B. M. Cox, in fee, reserving a life estate to herself.

The defenses presented are under three subjects of attack, namely: the status of the lease, the plaintiff's title and the obligations of the defendant as assignee.

It is claimed that in executing the lease, in 1876, Isaac McFarland had no estate in the land, and his wife, Josephine, no dower; and that, consequently, their signatures to the lease conveyed nothing. Further, that the estate of the trustee, John McFarland, being measured by the life of the trust, his power to lease was limited to the life of Isaac, unless the latter had executed his power of appointment and created further uses, which is denied; and that, in consequence, the lease expired with the life of Isaac. In the same connection it was urged that the trust was, in its essential nature, a "spendthrift trust;" and that the conveyances by Isaac to his wife, Josephine, were ineffectual for any purpose, because Isaac had power only to "appoint" and not to convey.

But this argument proceeds upon an assumption that the rights of Isaac McFarland were those derivable under a "spendthrift trust." On the contrary, since the net income of the land was to the *cestui* at all events, with power to collect, and without any discretionary control in the trustee, the right conveyed to Isaac was an equitable estate—the trustee holding the bare legal title. *Thornton v. Stanley*, 55 Ohio St., 199 (45 N. E. Rep., 318).

It was, moreover, under the rule in *Shelley's case*,—which is still in force in Ohio, except as to devises by will,—an equitable freehold estate for life with remainder to his heirs, and therefore an equitable fee, subject to the power of appointment, which is practically merged in the power of

alienation. *Brockschmidt v. Archer*, 64 Ohio St., 502 (60 N. E. Rep., 623).

The rule applies to all estates of freehold, whether legal or equitable. See Preston's statement (page 271) of the rule, adopted and approved by Chancellor Kent, 4 Kent's Commentaries, 22.

The title of the lessee under the lease made by John McFarland, Isaac McFarland and Josephine, the wife of Isaac, in 1876, was therefore complete by the merger at its inception of the legal and equitable titles and release of dower, vesting the perpetual use in the lessee.

The conveyance by Isaac to his wife through Cist, in 1878, if not a technically proper execution of the power of appointment, was nevertheless equivalent, in that it was a conveyance, *in futuro*, of the equitable fee; which title was confirmed by Isaac McFarland's will at his death in 1882; and this may be considered in equity as an execution of the power. *Barr v. Hatch*, 3 Ohio, 527, 529.

But this happened long prior to the defendant's succession to the lessee's title and possession under the lease, which occurred in 1885. By thus entering upon the estate and paying rent to plaintiff from 1885 to 1902, the defendant attorned to plaintiff as the reversioner, and is estopped to deny her title. *Washburn*, Real Prop., par. 745; *Moore v. Beasley*, 3 Ohio, 294; *Smith v. Harrison*, 42 Ohio St., 180; *Maxwell v. Griftner*, 5 Circ. Dec., 323 (11 R., 210).

The further claim that the subsequent conveyance by plaintiff to her daughter subject to the lease, with reservation of a life estate, was an eviction, is untenable. There was no disturbance of possession, or title of the lessee. The case of *Mathews v. Gas Co.*, 179 Pa. St., 165 (36 Atl. Rep., 216), was where a lessee had been in default for rent for years; and the conveyance, to take effect *in praesenti*, was construed as an assertion of lessor's right to forfeit.

In the present case, the conveyance was made subject to the lease which was duly of record and notice to all concerned; and the fact of occupancy and title of the tenant, being known to grantee who was bound thereby, it is not

a breach of the covenant for quiet enjoyment by the tenant. *Lindley v. Dakin*, 13 Ind., 388.

It is claimed, further, that, as assignee of the lessee, the defendant was bound for the rent only during occupancy, and that, having a right to assign, its liability ceased when it assigned to Nielsen in 1902.

The general proposition, that the liability of a mere assignee rests upon privity of estate, and not on contract, and that privity of estate as a covenant-real binds the assignee of the term only during his ownership and possession, is conceded. Washburn, Real Prop., par. 682.

It is also true, as argued at the bar, that the statute of 32 Henry VIII, C. 34, which extended privity of contract from reversioner to reversioner, and gave the right to sue in covenant in actions by or against assignees, is not in force in Ohio.

But, nevertheless, its place is supplied by the provision of the code authorizing suit by the real party in interest. *Masury v. Southworth*, 9 Ohio St., 340; *Smith v. Harrison*, 42 Ohio St., 180; *Hall v. Plaine*, 14 Ohio St., 417, 422.

The difficulties arising out of the rigidity of rules and forms of actions at law, *per se*, were the occasion for the adoption of our code of civil procedure; and the civil action of the code is designed for the application of both legal and equitable principles and relief. *Platt v. Colvin*, 50 Ohio St., 703 (36 N. E. Rep., 735). Consequently, while in a common law action such a covenant could not be enforced against an assignee, the code action, for the purpose of enforcing the liability consequent upon notice, in equity, may be regarded as an equitable proceeding. Moreover, *assumpsit* is an action of an equitable character (4 Cyc. 320; *Van Doren v. Robinson*, 16 N. J. Eq., 256; *Brewing Co. v. Holmes*, 69 L. J. Ch., 149). And can be employed to recover instalments as they become due upon a contract to pay a sum by instalments. *Hamlin v. Race*, 78 Ill., 422, 442; *Tucker v. Randall*, 2 Mass., 283; *Fontaine v. Aresta*, 2 McLean, 127 (9 Fed. Cas., 355).

In *Suliff v. Atwood*, 15 Ohio St., 186, there is also con-

tained an important exception to the general doctrine limiting the liability of assignees of lessees.

The court says, page 196:

"The legal duty of an assignee, arising from an assignment executed *without covenants on his part to perform the covenants of the lessee*, is limited to the time of the continuance of his interest * * * he is not chargeable for a breach of covenant happening after his assignment, for the privity of estate is wanting. * * * He is liable only in respect of his possession. * * * His liability will not continue though the assignment be made for the express purpose of getting rid of his responsibility."

The court proceeds to say, further, that, in view of this very contingency, a court of equity, if called on to enforce specific performance of an agreement of sale of the lease, would imply an agreement of indemnity in favor of the seller, "*as though the purchaser had agreed to assume all the lessee's burdens*" in taking over the lease, and would insert such covenant in the deed of transfer. (This case has been cited with approval in many subsequent cases.) In the present case, the parties themselves applied the equity rule in a little different way, namely: the Lysles executed a warranty deed of transfer with a covenant reading as follows:

"This conveyance is made subject to all the terms, stipulations, covenants, and agreements of said lease, as therein contained, *all of which the grantee assumes.*" And this was assented to and confirmed by acceptance of the deed, and entering into possession of the property and complying with the covenants of the original lease, thus assumed, for seven yeears. The signature to the deed containing this covenant, by the grantee, was not necessary. Acceptance and taking possession under it were sufficient to bind.

It was, in fact, a new contract, made and intended for the benefit of the successor in title of the reversioner, to whom the defendant attorned as landlord; and the consideration

was the warranty of title by the Lysles, which amounted to an independent covenant of seizin and enjoyment.

Thus the defendant "stepped into the lessee's shoes and assumed his obligations." *Woodland Oil Co. v. Crawford*, 55 Ohio St., 161, 179 (44 N. E. Rep., 1093; 34 L. R. A., 62); *Wetzell v. Richcreek*, 53 Ohio St., 62, 70 (40 N. E. Rep., 1004); *Poe v. Dixon*, 60 Ohio St., 124, 134 (54 N. E. Rep., 86; 71 Am. St. Rep., 713).

The principle upon which contracts made by two parties for the benefit of a third, are upheld in favor of said third party, is established in the United States by an overwhelming array of authorities. 9 Cyc., 377, and cases cited.

These cases also uphold the right of the party benefited to sue in his own name; and this is especially true in the code states which require suit to be brought in the name of the real party in interest. 9 Cyc. 377.

This is also settled law in Ohio—a few out of many cases being as follows: *Poe v. Dixon*, 60 Ohio St., 124 (54 N. E. Rep., 86; 71 Am. St. Rep., 713); *Society of Friends v. Haines*, 47 Ohio St., 423 (25 N. E. Rep., 119); *Emmitt v. Brophy*, 42 Ohio St., 82; *Brewer v. Maurer*, 38 Ohio St., 543 (43 Am. Rep., 436); *Burdick v. Cheadle*, 26 Ohio St., 393 (20 Am. Rep., 767); *Thompson v. Thompson*, 4 Ohio St., 333.

"It was competent for the parties to introduce into the assignment any covenant or stipulation pertinent to the subject which they may have agreed upon." *Wetzell v. Richcreek*, *supra*.

The covenant, here, bound the defendant to perform the obligations of the lessee, among which was the obligation to pay rent during the entire term. *Taylor v. DeBus*, 31 Ohio St., 468, 472.

The assignment by defendant, in view of these covenants, would not discharge it in respect of its liability. The defendant here occupies the relation of lessee to his assignee, and is thereby a surety. The lessor has his remedy against either. Washburn, Real Prop., par. 683; *McHenry v. Carson*, 41 Ohio St., 212, 221; *Poe v. Dixon*, *supra*.

It is therefore unnecessary to consider the character of

the assignment to Nielsen, under the circumstances of this case.

In accordance with the views above expressed, we must sustain the plaintiff's contention, and give judgment accordingly.

Judgment for plaintiff with costs.

C. Hammond Avery, for plaintiff.

Maxwell & Ramsey, for defendant.

SHOEMAKER ET AL. V. BECKER ET AL.

1. A lease is not necessarily void under Revised Statutes, 4364) and *Goodall v. Brewing Co.*, 56 Ohio St., 257, because the lessee maintains a bowling alley in conjunction with his sale of liquors. The force of the statute is aimed at the bowling alley and the sale of liquors is not rendered unlawful under the section quoted.
2. It is no defense to an action for rent under a written lease in which the unlawful use of the premises is expressly provided against, that the lessor and lessee had a secret understanding that the leased premises were to be used for an unlawful purpose, where the action is brought by the lessor's grantee and there is no showing that the plaintiff knew of the secret understanding or the unlawful use.

HOSEA, J.

The action being for rent under a written lease, the second defense alleges, in substance, that it was understood and agreed by defendant and plaintiff's grantor, that "notwithstanding the provisions in the lease to the contrary," the premises were to be used for an unlawful purpose, to wit: selling spirituous liquors and maintaining a bowling alley; and that defendant did in fact do so.

The defense is based on the statute making it a penal offense for one being the keeper of a public house or retailer

of spirituous liquors to operate a ball or nine pin alley in conjunction with said traffic. R. S., 7000.

It is argued that the unlawfulness in question extends to and makes the sale of liquors in such connection unlawful; and that this, in turn, brings the lease within the purview of R. S., 4364, which declares that "all contracts whereby any building or premises are rented or leased * * * for the sale of intoxicating liquors, shall be void." (This section has been construed in *Goodall v. Brewing Co.*, 56 Ohio St., 257, as relating only to the *unlawful* sale of spirituous liquors.)

The logic of the argument, however, is not persuasive, because it involves a false premise. R. S., 7000, reads thus:

"Whoever, being the keeper of a public house, or retailer of spirituous liquors, establishes, keeps, or permits to be kept, upon his lot or premises, any ball or nine pin alley * * * shall be fined not more than \$100 nor less than \$10," etc.

It is clear that this statute is aimed at the pin alley and not at the liquor selling; and this will more than clearly appear when we take into consideration the ancient common law objection to nine pin alleys, which were discounted as being resorts of the idle and vicious. The wording of the statute is too explicit to sustain the theory of the argument.

But the general principle established by the authorities is also adverse to the defendant's contention.

It was held by Lord Mansfield in *Holman v. Johnson*, Cowp., 341; by Buller, J., in *Waynell v. Reid*, 57 Term, 590, and by Lord Abinger in *Pellicet v. Angell*, 2 Crompt. M. & R., 311, that, to avoid a sale on the ground of unlawful use of the thing sold, something more than mere knowledge, by the seller, of the intent of the purchaser must be shown.

In *Tracy v. Talmage*, 14 N. Y., 162 (67 Am. Dec., 132), the principle is thus stated:

"If it be made part of the contract of sale that the property shall be used for an unlawful purpose, or, if the vendor,

with knowledge of the intent of the purchaser, do anything beyond making of the sale in aid or furtherance of the unlawful design, he can not recover for the property.

* * *

"Where the parties to a contract or transaction not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party."

Also on page 177:

"Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not *necessarily per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money." *Hill v. Spear*, 50 N. H., 253 (9 Am. Rep., 205).

The case of *Updike v. Campbell*, 4 Smith (E. D.), 570, contains an analysis of many English and American cases, and states the principle thus:

"From these cases, I think the general deduction must be that mere knowledge that the lessee would use the premises in violation of the statute, is not sufficient to avoid the lease, unless the lessor was a party to such intent and did some act in furtherance of the intended violation of the law. * * * The tenant was at liberty to follow his own conclusions as to the use he will make of the premises. He was under no obligation to so use them, nor did the lessor do anything to aid in such use." (To same effect, see *McKinney v. Andrews*, 41 Tex., 363; *Steele v. Curle*, 34 Ky. [4 Dana], 381, 390.)

A lease, at common law, being regarded as a sale of a limited estate in real property, the above cases apply.

Perhaps the most striking case to be found is that of *Taylor v. Levy*, 24 Atl. Rep., 608 (C. App., Md., 1892), which presents as strong a case on the facts as could be well imagined. The lessor, who had been in the unlawful business of maintaining a pool room, sold his equipment and

leased his premises to the defendant. The court of appeals says:

"We are all of opinion that there is no evidence from which the jury could find that the premises were rented to defendant for the purpose of using it as a pool room.

"Plaintiff did know that the premises had been and were used for that purpose. But there was no evidence that defendant was obliged to use it for that purpose. He could have used it for any other lawful purpose."

In the case at bar, the language of the answer shows that the covenants of the lease contain the usual stipulation against unlawful use; and even if a secret understanding to the contrary existed and could have been enforced between the parties, it is not charged that the plaintiff, the purchaser of the leased premises, had any knowledge of that fact when he acquired the property. Without such knowledge on his part the defense could not be maintained.

Demurrer sustained.

Chas. B. Wilby, for plaintiff.

Albert Bettinger, for defendant.

BEN JOHNSON V. CINCINNATI GAS AND ELECTRIC CO.

1. The servant does not assume the risk of negligence on the part of the master, but only those risks which inhere in the employment as conducted with ordinary care by the master.
2. The master must not, without good cause, place his servant in a place of danger; and he also owes the duties of employing competent servants, providing machinery and tools sufficient for the work to be done, and employing a sufficient number of servants for a given work according to the ordinary conditions of the business.
3. Negligence of the master towards a servant may be predicated upon his failure to provide a sufficient number of men for a given work as well as for a failure to provide suitable machinery and tools; and where a servant is overstrained and ruptured by being called upon to undertake more than his fair and reasonable amount of work, the result is properly

chargeable to the master's negligence in failing to furnish a sufficient number of men to perform the work.

4. Where four servants were called upon by the master to lift and readjust a heavy spar used in holding barges apart, which operation was usually performed by eight or ten men, and one of them was ruptured as a consequence of being required to lift more than his fair and reasonable amount, the master is liable therefor, as the danger of such an injury was not obvious to the servant, and the risk of the injury was not, in such case, assumed.
5. Whether or not the act of the master in ordering four men to perform a certain job of work, which usually required and was performed by eight or ten, was a reasonable one, is a question for the jury under all the circumstances; and if found to be unreasonable, it is no defense for the master to say that the immediate cause of the injury to one of the servants, who was strained and ruptured, was the negligence of his fellow-servants in the execution of the work. The rule of "fellow-servants" has no application in such a case.

HOSEA, J.

Motion to direct verdict.

The facts shown are, in brief, that plaintiff, a coal shoveler on the river barges of defendant, with three others, was ordered by the foreman to lift and re-adjust a very heavy spar used in holding barges apart. The operation was usually performed by eight or ten men; but on this occasion the working force was reduced to five, one of whom was required in another position, leaving only four to do the lifting, under the direction of the foreman, who asked the man to "help him out" by extra efforts in view of the limited force present. The lifting and adjustment of the spar was accomplished; but in the effort, the plaintiff suffered a rupture. It was shown on cross-examination that, during the operation while the spar was being held up, one of the men was obliged to shift his position from one side of plaintiff to the other, temporarily releasing his hold upon the spear, thus bringing an unexpected load upon plaintiff which caused the injury.

The negligence of defendant alleged was the insufficiency of men employed in the work. The rule is unquestionable

that the servant assumes all the risks incident to the employment; but by this is meant only those risks that may inhere in the employment as conducted with ordinary care by the master. The servant does not assume the risk of negligence on the part of the master. *Railway v. Henderson*, 37 Ohio St., 549; *Van Duzen Gas & Gas Eng. Co. v. Schelies*, 61 Ohio St., 298, 307.

The duty of the master is equally well established, he must not needlessly place a servant in place of danger; he must employ competent servants; he must provide machinery and tools suitable and efficient for the work to be done. He must also employ a sufficient number for a given work according to the ordinary conditions of the business, etc. *Shearman & Redfield*, Negligence, par. 193; *Thompson*, Negligence, 3807, 4768.

To provide a sufficiency of men for a given work is necessary for the same reason as to provide suitable machinery and tools; and negligence can be predicated of one as well as of the other. If the machine is unequal to a given work, or the number of men insufficient, in either case, the machine or the man is driven beyond the ordinary requirement and normal capacity. If, by being overburdened, the machine breaks and injures an operator, or the man is overstrained by being called upon to undertake more than his fair and reasonable amount of work, both results are due to the master's negligence in not furnishing that which his duty required him to furnish. *Shearman & Redfield*, Negligence, par. 193; *Lake Shore & M. S. Ry. v. Lavalley*, 36 Ohio St., 221.

The order to the four men to shift the heavy spar, coupled with the appeal to help out, presented an unusual condition. The danger of a personal injury of the character here in question was not obvious. In ordinary labor of this sort, where a sufficient number are employed, each man is only moderately taxed within the reasonable limits of his physical capacity. He still has a factor of safety—a residue of force available to meet a sudden extra demand. But where, as in this case, each man is taxed to his utmost limit by the ordinary demand of the work, an extra draft upon

his power can not be met and the human machine must give way.

Such a risk was not an obvious one to an ordinary laborer. His experience doubtless taught him the increased danger to be apprehended from an accidental slip of the spar from its fastenings or supports; and those risks, being obvious and known to him, he must be held to have assumed. The risk of overstraining himself in the effort to prevent disaster from those above indicated, was, however, not suggested to him by his former experience.

Under these circumstances, I think it may be fairly said that the order of the master,—through the superior servant, the foreman,—was an assurance that it was not considered by the master a risk which a prudent person should refuse to undertake; and that the servant had a right to rely on that judgment; and, so relying, is to be acquitted of the imputation of contributory negligence. *Shearman & Redfield, Negligence*, par. 186, and cases cited.

Whether the act of the master in giving the order was a reasonable one, in view of the previous custom as to numbers employed in this work, is a question for the jury under all the circumstances. *Railway v. Henderson, supra*, 553.

If unreasonable, and, by the execution of such order, the servant was injured, it is no answer for the defendant to say that the immediate cause of the injury was the negligence of the fellow-servant of such injured party in the execution of the unreasonable order. The rule of fellow servant has no application in such a case. *Railway v. Henderson, supra*, 553; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287.

The case of *Scanlon v. Railway*, 24 O. C. C., 256, cited as a "bottle case" to the contrary of these views, has no application. It will be found, on closer inspection, that the work of lifting the heavy frog was being done by the force usually employed for that purpose; and, as found by the court, by as many as could be employed. Also, that there was no negligence on the part of the company, but the primary and sole cause was the carelessness of the men and the negligence of a fellow servant combined.

While the principles here stated are in some respects new, they are nevertheless fairly within the scope of, and are a legitimate deduction from, the authorities given; and particularly the clearly expressed opinion of Judge Minshall in *Van Duzen Gas & Gas. Eng. Co. v. Schelies*, *supra*, pages 307 to 310 inclusive.

Motion overruled.

F. T. Cahill, for plaintiff.

G. H. Warrington, for defendant.

BEN JOHNSON V. CINCINNATI GAS AND ELECTRIC CO.

A motion for judgment on the pleadings on the ground that plaintiff failed to reply to the answer alleging contributory negligence, will be overruled when filed after trial to a jury as on issue joined upon the allegation of the answer and the evidence supporting it.

HOSEA, J.

The motion for judgment on the pleadings under R. S., 5328, of the code is not well taken. The point is that plaintiff failed to reply to the answer of defendant setting up contributory negligence.

The spirit and purpose of the code provisions is to require and enable parties to dispose of all purely technical questions before reaching the jury on the facts. Prescribed forms of procedure are intended to reach substantial justice and are not to be converted into traps for the unwary. There was a proper time in the progress in the case when the omission of a reply should have been taken advantage of, but that time had long passed when the case had been tried to a jury as though the issue had been taken upon the allegation of the answer and upon the evidence in support of it.

The objection comes too late. *Lovell v. Wentworth*, 39 Ohio St., 614; *Woodward v. Sloan*, 27 Ohio St., 592; *Hudson v. Voight*, 9 Circ. Dec., 35 (15 R., 391).

F. T. Cahill, for plaintiff.

G. H. Warrington, for defendant.

I. & E. GREENWALD CO. v. IRON MOLDERS' UNION.

1. Injuries arising from, and growing out of, boycotts, strikes and lockouts are continuing and irreparable in their nature, and incapable of admeasurement according to strict legal principles, and their redress therefore is the province of a court of chancery; and this right and power of redress of the courts is inherent in them as a co-ordinate branch of the government and can not be curtailed by legislation.
2. The inducement, on the part of an officer of a labor union, to non-union employes of plaintiff company to quit their employment and join the union, by means of veiled threats as to the possible consequences of acting as a "strike breaker" and by promises of railroad fare for themselves and families to another city and regular employment there, etc., is in violation of the provisions of an injunction theretofore granted commanding the officers and members of such union to desist and refrain from compelling or inducing employes by threats, intimidation, force, violence or unlawful persuasion, from freely continuing in the service or employment of the plaintiff company.

HOSEA, J.

Decision on contempt charges.

Charges in contempt were filed in this case on August 14 against John F. O'Leary, vice-president of the Iron Molders' Union of North America, and Henry Hinnenkamp, business agent of local No. 4 of the Iron Molders' Union of this city, for violation of the injunction issued by this court on September 30, 1904, and still in force.

The specific charge is, that on or about July 17, 1905, O'Leary and Hinnenkamp induced John East and Frank Reid, employes of the plaintiff company, to break their contract with plaintiffs and leave their employ, by paying said

*Since this opinion was handed down the same principles were considered and a like judgment rendered thereon by the Supreme Court of Illinois, in a case known as the Kellogg case. (*Kellogg Switch Board & Supply Co. v. Brotherhood of Electrical Workers et al.*)

employees, etch, a sum of money, and giving them railway tickets for themselves and wives to Cleveland, Ohio.

All parties were represented in court in person and by counsel and have had full opportunity to present testimony, and cross-examine opposing witness; and the cause was duly submitted to the court for judgment, counsel for both sides waiving argument.

There is no serious dispute upon the material facts. The testimony establishes the fact that the strike condition, which was the occasion of the injunction, still exists; that the strike is conducted directly by local union No. 4, through its officers and particularly through Hinnenkamp, its business agent and financial secretary, but under the supervisory direction of O'Leary, third vice-president and business agent of the Iron Molders' Union of North America, which is an international body with headquarters at Chicago.

It appears also, that the plaintiff company is still operating its business under the protection of the injunction of this court, and was so operating in July, with employees under wages, including East and Reid.

It appears also, without dispute, that East and Reid were accosted at various times and places by O'Leary, Hinnenkamp and other officers of the defendant unions on the subject of their employment, and that the talks finally led to proposals which were accepted, whereby both East and Reid were paid sums of money in cash, and given railroad tickets to Cleveland for themselves and families, with assurances of employment in that city; and that thereupon they quit the employment of the Greenwald Company and went to Cleveland.

The general character of the negotiations leading to this result is clearly indicated. East testifies, O'Leary asked him if he wanted to be "straightened up," and next day Hinnenkamp called and asked him what offer he could make to "straighten him up" and have him take a union card and leave town, and offered him tickets to Cleveland and fifty dollars in cash. The proposition was accepted and

the agreement carried out. The money finally paid included also the five dollars initiation fee of the union.

Reid testifies to visits from officers of the union, and from O'Leary, who told him to call on Hinnenkamp, all culminating in a similar proposition to "straighten him up," and get him out of town. Hinnenkamp paid him twenty dollars and gave him tickets to Cleveland.

Mr. O'Leary frankly testified that when he met East, in May or June, he told him that it was "unfortunate that he should start in as a strike breaker," and that "the odium would stay with him a long time."

Mr. Hinnenkamp also testified that he had charge of the strike on behalf of local No. 4 and that part of his duty was to "get scabs," meaning, to get men away from a non-union shop. He said all molders at Greenwald's foundry were considered "scabs," and he considered it lawful to see parties and get them into the union, and to purchase tickets for them to other cities; also that the issue of a union ticket would of itself compel a man to quit Greenwald's and prevent him from working there under present conditions.

He admits the payment of the money and procuring of tickets for East and Reid, out of the union funds in his possession, including the initiation fee, and claimed the right to issue a card to any one he saw fit to initiate.

Upon these facts the issue is clearly raised whether the seducing away of employes as a means of aiding a strike, falls within the scope of the injunction heretofore issued in this case.

The injunction order in terms commands the defendants, their confederates, servants and agents, and any and all persons aiding and abetting them, to desist and refrain, among other things, from:

1. Hindering, obstructing or stopping any of the business of plaintiff in this city, county or elsewhere.
2. In any manner interfering with the plaintiff company in carrying on its business in the usual and ordinary way.
3. Going either singly or collectively to the homes of the employes of the plaintiff company, or any or either of them,

for the purpose of, and in such a manner as to intimidate, coerce or unlawfully persuade any of said employes to leave the employment of the plaintiff company.

4. Compelling or inducing by threats, intimidation, force, violence or unlawful persuasion, from freely continuing in the service or employment of the plaintiff company.

The injunction order in this case was carefully drawn, in accordance with orders heretofore made by this court and by other courts in similar cases, and is designed to protect the plaintiff's business against unlawful interference.

There is no longer any question of the right of courts to prevent by their equity powers the commission of wrongs of the character too commonly inflicted in furtherance of strikes, rather than to remit parties to ineffectual remedies at law; and this right and power of the courts is inherent as a co-ordinate branch of the government and can not be curtailed by legislation.

In cases of this kind it is obvious that the injuries to business that can be, and frequently are, inflicted by bodies of men animated by a hostile spirit and a common purpose, are of a diverse character, and are continuing, irreparable and incapable of admeasurement according to strict legal principles. The remedy at law is entirely inadequate, and, as has been well said in a recent case on the subject:

"It is therefore a clear case for the interposition of a court of equity to exercise its preventive remedy, and that is the particular sphere at this day of a court of equity, as contradistinguished from a court of law." *Frank v. Herold*, 63 N. J. Eq., 443 (52 Atl. Rep., 152).

In the present case no direct violence is shown; but, if the attitude of the union defendants is truly indicated by Mr. Hinnenkamp, the right is claimed to seduce away workmen by any means short of violence. But whether done with violence or without it, the purpose is clearly the same in both cases, namely, to cripple the business and thus compel concession to the demands of the union. The results, manifestly, are the same in both cases; for, whether

with violence or by means that do not involve violence, the manufacturer is deprived of the assistance of his workmen, his machinery must stop and his business come to a standstill. It follows, therefore, that a mere difference in the means employed in inflicting the injury, provided they are both actuated by an unlawful purpose and both tend to the same unlawful end, can make no difference in the wrongful character of the act. That character is to be determined by the initial purpose and the final result in the end sought to be accomplished.

The case last cited contains a very pertinent and forceful illustration of the nature of the injury inflicted upon an employer by thus seducing away workmen. In the course of the opinion the court says:

"In doing so they are inflicting an injury upon the complainants in respect of their private rights, precisely the same as they would if they broke, interfered with, or clogged the engine that drove the machinery, and for such an injury the complainants are entitled to a legal remedy by action."

These views are not only obviously rational and just, but they have been repeatedly declared and upheld by the courts of last resort. I call attention here to but two, as illustrating the law applicable in cases like the present.

In *Jersey City Ptg. Co. v. Cassidy*, 63 N. J. Eq., 759 (53 Atl. Rep., 230, 232), the court employs the following language:

"That the interest of an employer or an employe in a contract for services is property, is conceded. Where defendants in combination, or individually, undertake to interfere with, and disrupt, existing contract relations between the employer and employe, it is plain that a property right is directly invaded. The effect is the same whether the means employed to cause the workman to break his contract, and thus injure the employer, are violence or threats of violence against the employe, or mere molestation, annoyance, or persuasions. In all these cases, whatever the means may be,

they constituted the cause of the breaking of a contract, and consequently they constitute the natural and proximate cause of damage."

In *Lucke v. Cutters' & Trimmers' Assembly*, 77 Md., 396 (26 Atl. Rep., 505; 19 L. R. A., 408; 39 Am. St. Rep., 421), the distinction between persuasion which may be a lawful act and persuasion which is unlawful because used as the instrument of accomplishing an unlawful purpose, is again defined. The court says:

"Merely to persuade a person to break his contract may or may not be wrongful in law or fact, but if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore an actionable act if injury follows from it."

In the case of *Hillenbrand v. Building Trades Council*, 14 Dec., 628, which came before me in this court in 1904, I took occasion to review the law as to the relation of employer and employe in order to show that the jurisdiction of the court in the matter was based on ancient precedents of the English law. It may be profitable to repeat a few of the citations.

In *Hart v. Aldrich*, Cowp., 54 (1774), journeymen shoemakers, working by the piece and for no determinate time, were enticed away, to the damage of the employer in his business. Lord Holt sustained the case, upon the ground that such a servant is, in law, a servant by the day, whether the work is by piece or by the day.

In *Gunter v. Astor*, 4 J. B. Moore, 12 (1819), the defendants clandestinely sent for the workmen of the plaintiff, got them intoxicated and induced them to sign an agreement to leave the plaintiff and to come to them. It was held that as the act was of several and the end unlawful it amounted to a conspiracy.

In *Lumley v. Gye*, 2 Ell. & Bl., 216 (1853), the case was made out under a statute known as the statute of laborers, but the court declared that an action lay independently of the statute for maliciously inducing another to break a con-

tract of any description where damage ensues to the party with whom the contract is made, and where two or more persons were concerned in inflicting such injury, an indictment or writ of conspiracy at common law might be maintainable.

In *Bowen v. Hall*, 6 Q. B., 333 (1881), nearly thirty years after the decision in *Lumley v. Gye*, the Queen's Bench again carefully considered and affirmed the doctrine thus established, and said by Brett, L. J.:

"Whenever a man does an act which in law and in fact is a wrongful act, such as may, as a natural and probable consequence of it, produce injury to another—and, in the particular case, does produce such an injury—an action on the case will lie. And the action does not the less lie because the consequence of the act complained of is the act of a third person. If the persuasion is used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which in law and in fact is a wrongful act."

In *Angle v. Railway*, 151 U. S. 1, 13 (14 Sup. Ct. Rep., 240; 38 L. Ed., 55), the Supreme Court of the United States reviewed the authorities upon this doctrine, citing them with approval, and deducing therefrom the application of the rule to "every case where one person maliciously persuades another to break any contract with a third person," and holds that it is not confined to contracts of service.

The principle is well stated by the Circuit Court of the United States in *Kunsden v. Bann*, 123 Fed. Rep., 636:

"Fellow workmen may agree together to leave at once the service of their employer, but having done so, and being no longer interested in the matter, then, notwithstanding certain dicta in cases on the subject, it does not seem clear that they are acting lawfully when they are persuading the servants of their former employer to break their contracts and leave the service. It is a matter that does not concern them any longer; it is a matter that is apparently injurious to their former employer. It seems to me that such an in-

terference in a matter with which they have no rightful concern and which is injurious to another, is not lawful. They have no right to interfere with the business in any way."

These are a few of the many utterances of the courts declaring the settled law upon this subject. See also: *Beck v. Teamsters' Protective Union*, 118 Mich., 497 (17 N. W. Rep., 13; 42 L. R. A., 407; 74 Am. St. Rep., 421); *Barr v. Trades Council*, 53 N. J. Eq., 101 (30 Atl. Rep., 881; *Martin v. McFeall*, 65 N. J. Eq., 91 (55 Atl. Rep., 465); *State v. Glidden*, 55 Conn., 46 (8 Atl. Rep., 890; 3 Am. St. Rep., 23); *Southern Ry. v. Machinists' Local Union*, 111 Fed. Rep., 49; *Vegelahn v. Gunter*, 167 Mass., 92 (44 N. E. Rep., 1077; 35 L. R. A., 722; 57 Am. St. Rep., 443); *Plant v. Woods*, 176 Mass., 492 (57 N. E. Rep., 1011; 51 L. R. A., 339; 79 Am. St. Rep., 330); *Moran v. Dunphy*, 177 Mass., 485 (59 N. E. Rep., 125; 52 L. R. A., 115; 83 Am. St. Rep., 89); *Carew v. Rutherford*, 106 Mass., 1 (8 Am. Rep., 287); *Gray v. Trades Council*, 91 Minn., 171 (97 N. W. Rep., 663; 103 Am. St. Rep., 477); *O'Neil v. Behanna*, 182 Pa. St., 236 (37 Atl. Rep., 843; 38 L. R. A., 382; 61 Am. St. Rep., 702); *Doremus v. Hennessy*, 176 Ill., 608 (52 N. E. Rep., 924; 54 N. E. Rep., 524; 43 L. R. A., 797; 68 Am. St. Rep., 203). I have quoted from cases that deal concretely with the particular matter of "unlawful persuasion" in terms that require no explanation. But the same conclusion results from other and fundamental considerations, and I repeat here what I said in this court in the case of the *Cincinnati Brewing & Silvering Co. v. Precht*, (unreported).

"The bill of rights embodied in the Constitution of Ohio, guarantees to every citizen an inalienable right—among others—of acquiring, possessing and protecting property and of seeking and obtaining happiness and safety; and it is therein further provided that courts shall be open to every one for the exercise of his remedy by due course of law for an injury done him in his land, goods or person. No one need be told that the right to carry on legitimate business freely, without molestation or hindrance, is not only the right and privilege of the citizen under these fundamental

guarantees of the constitution, but is essential to the well-being of every civilized community; and that it is the duty of the courts to afford every reasonable protection for the exercise of such right. The right of the laboring man whose business capital is his skill and industry, is to be upheld and protected equally with the right of an employer of labor to carry on a manufacture involving such employment; and the fact that these rights are reciprocal in no wise lessens the obligation of the courts to see that both are properly protected."

The application of these principles to the case in hand is perfectly clear. O'Leary as a supervisory officer in behalf of the larger body, and Hinnenkamp in immediate charge of the strike operations in behalf of the local union, were acting in co-operation. There is no denial of the material facts. That the parties enticed away were open to the persuasion of money does not lessen the wrong of those who used it. The admission of O'Leary that he began his talks with East by allusions to his being a "strike breaker" and the "odium" that would stay with him, and of Hinnenkamp, that all of Greenwald's men were regarded as "scabs," suggest an inference that behind all the talk and the "persuasion" was the veiled threat of the power of the union, international in its scope.

"Language," said Judge Rufus Smith of this court, in the case of the *Eureka Foundry Co. v. Lehker*, 13 Dec., 398, 402, "is none the less a threat because when used alone it appeared harmless, but when used in connection with the tone of voice in which it was expressed, the gestures accompanying it or other surrounding circumstances, it conveyed to the mind a threat. A veiled threat is still a threat. * * * Any course of conduct upon the part of others which deprives or substantially affects the freedom of mind of such workmen in reaching a decision to remain with him, or the freedom of will in carrying that decision into execution is an unlawful interference with the right of the owner of the business."

Substantially similar language is employed by the Supreme Court of Massachusetts in *Plant v. Woods*, 176

Mass., 492, 493 (57 N. E. Rep., 1011; 51 L. R. A., 339; 79 Am. St. Rep., 330).

Such being the law, it is plain that the defendants named have violated each and every one of the hereinbefore quoted prohibitions of the injunction order.

To seduce away plaintiff's employes for the purpose of aiding the strike was directly to hinder and obstruct and unlawfully to interfere with plaintiff's business. So-called "persuasion" with this object in view is clearly unlawful persuasion, and it is a farce to characterize as "persuasion" the act of enticing men away under such circumstances by the payment of money, with the threat of the union in the background.

It is clear beyond question, upon the evidence and the law, that the defendants, John R. O'Leary and Henry F. Hinnenkamp, have knowingly and wilfully violated the injunction and are guilty of contempt as charged, and such is the finding of the court.

The sheriff will take the defendants named into custody and present them before the bar of the court for sentence.

John R. O'Leary and Henry F. Hinnenkamp, you stand charged with contempt under the statute of Ohio in this behalf, for the violation of an injunction of this court issued on September 30, 1904, and still in force. On this charge you have been tried and have met all witnesses face to face with privilege of cross-examination, and have been attended by your counsel. Upon due and careful consideration of all the testimony, including your own, you have been found guilty as charged, and are before me for sentence. What have you to say before the sentence of the court is pronounced?

Mr. O'Leary and Mr. Hinnenkamp: "Nothing."

THE COURT: The sentence of the court is, that you and each of you pay a fine of \$100 for the use of the county, and give an undertaking in the sum of \$500 to obey said injunction so long as the same may be in force, and that you stand committed until the fine is paid and the undertaking given.

MARY SCHNEIDER V. CITY OF CINCINNATI.

1. So long as the officers of a municipal corporation act in good faith in the establishment and maintenance of streets, no liability attaches against the corporation for their errors of judgment; it is only for their negligent failure to perform their duties as to the same that the municipality is liable.
2. In an action for personal injuries, a municipal corporation will not be charged with notice of the dangerous condition of a street crossing caused by a hard rain occurring so recently as to preclude a reasonable presumption of notice.
3. Where the testimony, in an action for personal injuries against a municipal corporation, shows that the dangerous character of a curbing and street was caused by a heavy rain, the plaintiff will be charged with knowledge of such fact as well as the city; and where plaintiff took her way across such dangerous place when it could have been avoided, with her hands so engaged that if she slipped she would be unable to assist herself, this will create a presumption of contributory negligence.

HOSEA, J.

Motion to direct a verdict.

This motion raises important questions and places upon the court the possible necessity of assuming a responsibility that a court would much prefer to leave with a jury; but it is the duty of the court so to act if the facts require it and it is reversible error not to do so.

The plaintiff's testimony shows that she lived in the immediate vicinity of the place of the accident, on the same side of the street for about a year and a half prior thereto, and frequently passed over the sidewalk where the accident occurred. An alley comes down from a higher level at a uniform inclination, to the level of Hunt street, with which it connects, and the curb of the alley, at the same inclination, meets the curb of Hunt street. The alley curb, starting at the sidewalk surface of Hunt street, at the level of its outer edge or curb, inclines upward to a height of seven or eight inches above the sidewalk at the house line. The alley construction was made as a city improvement under direction, and according to stakes set, by the city engineer. Some

earth had accumulated at the outer side of the alley curb in the angle formed with the sidewalk, and extended from the curb at about an inch below the curb-surface to the sidewalk, two and one-half feet distant.

Plaintiff admits that she knew the exact condition, for she says it was that way all the time she lived there, just as it was at the time she was hurt, and that she had noticed the mud next to the curb; and again, that it was in about the same condition all the time.

In coming down Hunt street she crossed the alley and at the south side of it put her foot over the curb and upon the slanting mass of earth at the lower side. Her foot slipped and she fell. This occurred between 6 and 7 P. M. on October 12, 1901, while she was walking with a bundle in one hand and a bucket of hot coffee in the other. It was dark and it had rained all day, and the earth where she placed her foot was muddy and soft, and where she stepped was, she says, three or four inches higher than the sidewalk beyond.

In every suit based upon personal injuries, the burden is upon the plaintiff to prove negligence on the part of defendant as the direct cause of the injury; and if, in the endeavor to prove this, the plaintiff raises a presumption of contributory negligence, on his own part, he has also the burden of overcoming this by proof. These propositions are so well established it is unnecessary to cite authorities.

1. As to negligence of the city.

(a) So far as concerns the construction of the alley where it leads into Hunt street, it is shown to be in accordance with the plans of the city authorities and it is not claimed to be in a defective condition or negligently constructed *per se*.

"In all such matters, the corporate authorities have a discretion to exercise; and, however unwise their judgment may turn out to have been, the corporation will not be liable in damages for the consequence of their un wisdom." 1 Shearman & Redfield, Negligence, par. 262; *Dayton v.*

Taylor, 62 Ohio St., 11 (56 N. E. Rep., 480); *Wheeler v. City*, 19 Ohio St., 19 (2 Am. Rep., 368).

The underlying reason for this I apprehend to be, that the council that adopts, and the engineer who carries out, the adopted plan, are the direct representatives and servants of the people who elect them for this purpose. So long, therefore, as they act in good faith, their acts are the acts of the people themselves, and no liability attaches for errors of judgment. It is only for negligent failure to perform duties that the municipality is liable.

(b) It is the statutory duty of the city council to keep the streets and sidewalks "open, in repair, and free from nuisance." Sec. 28 Mun. Code. But the law exacts only what is practicable and reasonable in this regard. *Chase v. Cleveland*, 55 Ohio S., 505 516 (9 N. E. Rep., 225; 58 Am. Rep., 843).

In the present case, there is no question of repair or want of it; the case rests therefore upon the allegation of nuisance or unsafe and dangerous condition for ordinary purposes of travel. The unsafe and dangerous character of the obstruction is the gravamen of the petition; for, if it did not render the sidewalk unsafe, there was not such negligence on the part of the city as would afford a ground of complaint.

(c) But, if a sidewalk is in a dangerous condition, and this is alleged as a basis of liability against the city for its negligence in permitting it to exist, it must be made to appear, first, that the city had notice, actual or constructive, of the dangerous condition of the walk in time to remedy it; and, second, that, having such notice, it was the city's duty to remedy it and that it failed to do so.

The petition in this case alleges notice. Under the strict rules of pleading this will not support proof of constructive notice—but the proof fails entirely to show actual notice and fails to show any such facts and circumstances as would, by the exercise of reasonable diligence, lead a prudent person to such knowledge.

Constructive notice by mere lapse of time during which

a condition has existed, is based primarily upon the fact of a condition that is *obviously* unsafe and dangerous.

In *Chase v. Cleveland*, *supra*, at page 515, Judge Spear uses language very pertinent in this connection. He says:

"Regarding the removal of dangers, as well as regarding watchfulness in ascertaining their existence, the municipality is bound to exercise only ordinary care; to take such measures as are reasonably to be required and adequate, in view of ordinary exigencies. The condition of the walk in this case is not complained of as a defect in the sidewalk, but rather an accumulation on it which created a nuisance. * * * Those authorities are empowered to clear the streets from snow and filth, and, by ordinance, to require property owners to keep the walks cleared from snow and ice, but ordinarily, liability does not attach for a failure to do so. Slipperiness may arise from a variety of causes. A thin film of mud on the walk may often produce it, and yet liability would hardly be claimed to arise from such cause. * * * The law exacts from municipalities only that which is practicable and reasonable in regard to keeping streets open, in repair and free from nuisance; that the duty of the municipality, under the statute, must be interpreted upon a reasonable basis in reference to the actual condition of affairs; that impracticable things are not required, and that to hold the city liable, under the allegations of this petition, would be to require that which is impracticable, and to impose an onerous and unreasonable burden upon it."

That it is the notoriety of the dangerous and unsafe condition that constitutes the basis of the presumption of notice, as a condition so obvious as to force itself upon the attention of passers-by and by consequence upon the city authorities, is plainly indicated, though not so directly set forth, in the case just cited; but it is clearly declared in many other cases.

Thus in *Todd v. Troy*, 61 N. Y., 506, 509, it is said:

"When a defect has become notorious, and its officers

have full opportunity to know of it, the municipality is chargeable with notice."

Again, in *Hart v. Brooklyn*, 36 Barb., 226, 229, it is even more forcibly put.

Substantially similar rulings occur in *Hyatt v. Rondout (Vil.)*, 44 Barb., 385; *Clark v. Lockport*, 49 Barb., 580, and *Pomfrey v. Saratoga Springs (Vil.)*, 104 N. Y., 459 (11 N. E. Rep., 43).

But in this case there is no evidence whatever—except it be the fact that plaintiff fell there—that the walk at that point was defective or dangerous in any sense. Assuming the facts to be as stated, the condition complained of was manifestly caused, as stated by plaintiff, to the muddy and slippery condition caused by the all-day rain immediately preceding. It was, therefore, not a general or continuing condition, nor one necessarily to be expected from every rain. It is part of a sidewalk in a populous part of the city, and the earth, it may be fairly inferred, was beaten hard by the feet of pedestrians, and under ordinary circumstances would not be slippery. If, as stated in the testimony, it was muddy, soft and slushy, this was manifestly the result of the prolonged rain of the day or more preceding. Its unsafe condition therefore was temporary only, and from a cause so recent as may fairly bring the case within the principle laid down in *Leipsic (Vil.) v. Gerde-man*, 68 Ohio St., 1 (67 N. E. Rep., 87), where it was held that constructive notice can not be based upon causes of a dangerous condition, operating so recently as to preclude a reasonable presumption of notice.

The case cited is a clear exposition of the law and of the duty of a judge, under such circumstances as are found in the present case. The court says, page 7:

"Where, in any case, there is in the evidence a conflict or dispute as to the facts, or there is doubt as to the proper inference to be drawn from them, the question of negligence is one for the jury and should in such case be submitted to the jury under proper instructions. But where, as in this case, all the facts which the evidence tends to

prove, if admitted, do not authorize the conclusion that defendant has been guilty of the negligence charged as matter of law, then the question becomes, and is, a question for the court and should not be submitted to the jury for decision. It does not follow because the plaintiff was injured upon a public street or sidewalk of said village that the village is liable to her in damages therefor; injury alone will not support an action, but there must be a concurrence of injury and wrong. An incorporated village is not an insurer of the safety of its streets and sidewalks, nor of the lives and limbs of the persons passing over and along the same; nor is such village required, in the improvement and care of its streets and sidewalks, to do everything that human energy and ingenuity can devise to prevent the happening of accidents or injuries to persons who may rightfully use such streets and sidewalks. Its duty under the law is to see that its streets and sidewalks are reasonably safe for use and travel by persons exercising ordinary care and caution, and while the law requires, on the part of such village, reasonable vigilance in this behalf, it does not exact or require that which is unreasonable or impracticable. Where a sidewalk, of a village, which is in reasonably safe condition for public travel, by the collection or formation of ice thereon suddenly becomes dangerous, the village can not in law be charged with negligence because of such dangerous and unsafe condition, nor can it be held liable therefor, where it has neither actual nor constructive notice of such condition. There is no claim or evidence in this case that the village had any actual notice of the icy condition of this sidewalk, and before it would be chargeable with constructive notice, such condition must have existed for such length of time prior to this accident, as that the village, through its officers or agents, in the exercise of ordinary diligence, could and should have known of such condition. But the evidence in this case showing, as it does, that the icy condition of this walk at the place where plaintiff was injured was due to the freeze of Saturday night; and that the accident of which plaintiff complains occurred as early as eight o'clock the following

morning (the plaintiff herself testifying that it occurred about half-past seven o'clock), the question of constructive notice did not arise and was not involved in this case, and should not have been submitted to the jury."

2. Contributory negligence.

It happens, not infrequently, that, in detailing the acts and circumstances of an injury charged to the negligence of another, there is also shown a failure to exercise the care and caution required of the plaintiff in the action.

In this case it is manifest that the inclined bank of earth described, existed, practically, only very near the house line, because the alley curb sloped downward across the pavement toward Hunt street and the rise (assuming the pavement to be of a width of only ten or twelve feet, which is a low average) was less than an inch to the foot. At the central and outer portions of this cross curbing there could have been no bank of earth to speak of.

The conditions were well known and familiar to the plaintiff. If rains tended to make this earth slippery, this was a fact she knew as well as an agent of the city could have known it. If, therefore, the condition was in fact dangerous, as she alleges, and presented an obstruction which the city was bound to remove, and was negligence to leave unremoved, it must follow, since its character was known to plaintiff, that it was imprudent in her to pass over it or that, if she did pass over it, that she did not use due care.

As is said in *Schaeffer v. Sandusky*, 33 Ohio St., 246, 249 (31 Am. Rep., 533):

"The case * * * is not one where there is an obstruction not known to be perilous. In that class of cases negligence can not be imputed to one who uses such carefulness as a man of ordinary prudence would exercise. But where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily, can not be regarded as exercising ordinary prudence, and therefore does so at his own

risk." Citing *Durkin v. Troy*, 61 Barb., 437, and other cases.

In the case at bar the plaintiff not only took the dangerous way where it could have been avoided by passing nearer the curb line of Hunt street, but did so with both hands occupied with things carried, whereby she was deprived of the assistance which might have avoided serious injury even under the circumstances of the fall, if her hands had been free.

The same principle is declared by Judge Shauck in the case of *Conneaut (Vil.) v. Naef*, 54 Ohio St., 529, 530, 531 (44 N. E. Rep., 236).

The fact that the evening was dark only emphasized the requirement of care on the part of plaintiff, and makes the absence of care more apparent.

The case, as was said in *Balt. & O. Ry. v. McClellan*, 69 Ohio St., 142, 157 (68 N. E. Rep., 816), is not one which presents a conflict in the evidence on any vital point. The rule is, that, whether or not there is evidence tending to prove an essential fact, is a question for the court; and if it be determined that there is not, then there can be no conflict and there is no question for the jury.

In the case cited it is held to be error for the court to refuse to sustain a motion where the facts are as stated.

On this ground also the motion is granted.

Motion to direct a verdict sustained and verdict directed.

F. M. Coppock, for plaintiff.

J. V. Campbell and *C. W. Scott*, Assistant City Solicitors, for defendant.

PHILIP C. SWING v. CINCINNATI, MILFORD & LOVELAND
TRACTION Co.*

Equity will not assume the functions of a court of law and disentangle a complicated real estate title as a basis for granting an injunction, especially where the plaintiff is not in possession. Where his right is doubtful or the facts not definitely ascertained, his right must be first established at law. Hence, a street railroad company will not be enjoined from constructing a track in and along certain vacant property, the title to which is in dispute, at the suit of plaintiff who has only a paper title by quitclaim deed, with no evidence of occupancy or actual dominion, and where defendant's title is based on what appears to be a clear record title, with evidence of actual and notorious occupancy for over fifty years.

HOSEA, J.; SMITH and FERRIS, JJ., concur.

Reserved from special term.

Plaintiff sues, alleging ownership of two lots, known as lots E and 114 of Montauk subdivision—said lots fronting on the turnpike road in the portion of the village of Milford lying west of the Little Miami river, in Hamilton county—to enjoin the defendant from constructing a street railway in and along said street in front of said lots. Various questions of a complex nature were raised upon the pleadings and discussed with much force in argument, but in the view we take of the case, their consideration here will not be necessary.

The testimony shows that the title presented by plaintiff to maintain this suit, is a paper title by quit-claim deed, with no evidence of occupancy or actual dominion of the lots in question, which are vacant property. Defendant shows what appears to be a clear record title to lot 114, with evidence of actual ownership running through many years, in the Little Miami railroad; and upon the testimony there can be little question that for the purposes of this

*Affirmed by Supreme Court. 74 O. St. —.

suit, the title of the railroad company is superior to that shown by plaintiff.

The testimony as to the claim of title of plaintiff to lot E, leaves the matter of record title confused and doubtful; but that relating to the possessory title in the railroad company, leaves practically no doubt of the actual, open and notorious occupation and use of the property by the railroad company for a period of nearly fifty years down to the actual present.

Without going further into details of the evidence, it is fundamental that in a suit of this nature, where such a condition of title is shown, a court of equity will not assume the functions of a court of law and disentangle a complicated web of title as a basis of injunctive relief, and especially so where the suitor is not in possession.

In seeking to call into exercise the extraordinary powers of equity, it is incumbent on a plaintiff to show a case clear of doubt and based on a clear and unexceptionable right. *Spangler v. Cleveland*, 43 Ohio St., 526, 536.

Courts will not exercise this necessary authority where the right is doubtful or the facts not definitely ascertained. *Burnham v. Kempton*, 44 N. H., 78, 92.

Plaintiff must make out a clear and well-defined right, other wise he must first establish it at law. *Fisher v. Hotel & Amusement Co.*, 7 Dec., 67 (4 N. P., 329).

These authorities do but state principles lying at the foundation of equity procedure, and which should be applied here. We do not think the right of plaintiff is shown with sufficient clearness to justify an injunction. The temporary order therefore must be dissolved, and the petition dismissed, and it is so ordered.

Petition dismissed.

Burch & Johnson, for plaintiff.

C. W. Baker, for defendant.

CORNELIUS ARCHDEACON *v.* CINCINNATI GAS & ELECTRIC
COMPANY ET AL.

1. Conditions precedent required by law constitute a part of the cause of action, and must be performed before a cause of action will accrue and remedial rights arise. *A fortiori* is this true with respect to conditions precedent contained in a statute creating a right or duty unknown to the common law.
2. R. S., 6234 and 6135, creating a cause of action for death by wrongful act, and providing that such action shall be brought in the name of the personal representative of the deceased, etc., create a right and provide a remedy which did not exist at common law, and should be given effect according to the words used to accomplish the purpose intended.
3. The limitation of two years prescribed by R. S. 6135, within which an action must be brought by the personal representative of a deceased person to recover damages for death by wrongful act, is an essential condition of the right of action created by R. S. 6134, and begins to run against the beneficiaries, for whose exclusive benefit the right of action is created; and, once beginning, it continues to run on to completion without interruption.
4. The appointment or non-appointment of an administrator of the estate of a person whose death was caused by wrongful act, being a matter within the control of the parties in interest, the beneficiaries, has no effect upon the operation of the statutory limitation upon the cause of action given by R. S. 6134 and 6135.
5. It is a condition precedent to the right of action given by R. S. 6134, 6135, for death by wrongful acts, that there be an administrator in existence upon whom the right to bring the action may devolve; and where an administrator was not appointed until after two years from the time of decedent's death, within which time the action must be commenced, the cause of action is barred, notwithstanding application for the appointment of such administrator was made before statutory period had fully run. In such case, the appointment can not be made to date back to the time of the application. Hence, where an action was commenced by a person as administrator after an application for his appointment had been made, but his appointment as such was not perfected until after two years from the death of the decedent, the action will be dismissed.

HOSEA, J.

Heard on special answer in the nature of a plea in abatement and proof.

The defendant, by leave of court, filed in this cause an amended answer, setting up that the plaintiff is without legal capacity to maintain this action; and, upon motion to this effect, the cause has been heard upon the amended answer as upon a plea in abatement, for the reason that it raises an objection, independently of the merits of the cause, which is fatal to the action if the facts be proved and the legal consequences claimed to result therefrom be sustained; and was duly heard upon evidence taken and arguments of counsel thereon.

The facts shown are, that John Archdeacon came to his death on or before February 5, 1903, from causes claimed to be due to the negligence of the defendant company; that on February 5, 1903, Cornelius Archdeacon applied to the probate court to be appointed administrator, making oath that there were no assets except the right of action in this behalf; and it also appears that on March 28, 1903, he filed a petition, as administrator, in the present suit, to which the defendant answered, denying liability under the general issue.

It further appears that Cornelius Archdeacon did nothing further to perfect his application to be appointed administrator until March 10, 1905, after the cause had been set for trial—when he filed his bond in the probate court, and thereupon, on said March 10, 1905, letters testamentary were issued.

It is claimed in support of the plea that as the plaintiff here was not administrator in fact when the suit was brought, the proceedings therein were nugatory; and that when the plaintiff became administrator two years later, by perfecting his application and obtaining letters of administration on March 10, 1905, the cause of action had abated by the statutory limitation, and could not be revived, and that, consequently, the plaintiff is without capacity to sue.

Against the plea it is claimed that, the statute in this

behalf being remedial, all proceedings under it are to be construed liberally; that the power and the authority of an administrator upon appointment relate back to the time of death, or, at least, to the date of application, and thus cure the defect of premature action. Also, that, by answering, the defendant waived all objections, and is bound thereby, because the defect was a matter of public record which implies notice.

It may be admitted that under ordinary circumstances of equitable procedure the questions here would seem to be resolvable against the plea, provided the matter is one admitting of application of purely equitable considerations.

The statute in question, R. S., 6134, 6135, was originally passed March 25, 1851, and subsequently amended. The portions involved in the present consideration will be found in R. S., 6135, as follows:

"Every such action shall be for the exclusive benefit of," etc. (indicating beneficiaries), "and it shall be brought in the name of the personal representative of the deceased person; * * * shall be commenced within two years after the death of such deceased person."

It is an established principle that conditions precedent, required by law, constitute part of the cause of action; and strictly, therefore, must be performed before the cause of action will accrue and the remedial right arise. This is invariably true of conditions precedent contained in a statute creating a right or duty unknown to the common law. *Pawlet v. Sandgate*, 19 Vt., 621; *Weeks v. O'Brien*, 141 N. Y., 199 (36 N. E. Rep., 185); *Bradley v. Kroft*, 19 Fed. Rep., 295.

The statute in question is of this character; it gives a right and a remedy which did not exist at common law, "and should have effect given to it according to the words used in it to accomplish the purpose intended." *Steel v. Kurtz*, 28 Ohio St., 191, 193.

"The action being the creature of the statute must be governed by the statute." *Wolf v. Railway*, 55 Ohio St., 517, 527.

In *Wolf v. Railway*, *supra*, page 533, it is also held that while an estate will vest in the heir by operation of law, "it is otherwise as to a recovery for damages under our statute. While the liability is created by the statute, the damages do not become a part of the estate, and are not cast as an estate by operation of law upon the beneficiaries, but must be sued for and recovered by action."

In *Helman v. Railway*, 58 Ohio St., 400, 409, it is held that the statute created no new liability upon the death of the party, but in effect removed the common-law bar of abatement by death and the right of action accruing to the party for the injury, and devolved it upon the administrator in succession; and that, in consequence, the administrator and beneficiaries stand in relations of privity with the deceased in respect of such right.

It follows, therefore, that the limitation of two years is an essential condition of the right of action, and begins to run against the beneficiaries, for whose exclusive benefit the right of action is given; and, once beginning, it runs on to completion without interruption. *Granger v. Granger*, 6 Ohio, 35, 42.

The appointment or non-appointment of an administrator, therefore, being a matter within the control of the parties in interest, can have no effect upon the operation of the statutory limitation upon the cause of action.

The administrator is a mere trustee, in whose name the action must be brought. He has no right in the matter except in virtue of the right of the real parties in interest. If the right of the legal beneficiaries is lapsed or lost, so that no remedy can be had upon it, it is manifest that the action can be no longer maintained. *Woodward v. Railway*, 23 Wis., 400, cited and approved in *Wolf v. Railway*, *supra*, page 531.

In a word, therefore, the beneficial interest in the subject-matter of the right of action passed in succession to the beneficiaries by virtue of the statute, immediately upon the death; but the right to institute the action remained in suspense as an incident of the cause of action until the appointment of the administrator. But in the present

cause the administrator did not come into existence, as such, until March 10, 1905—more than two years after the death of the injured party; at which time the right of the beneficiaries had lapsed, and, consequently, the cause of action was never legally completed.

It is fundamental that a plaintiff must have a right of action before bringing suit; and to constitute a right of action there must be a party entitled to institute process. App., 421; *Stratton v. Railway*, 74 Me., 422; *North Branch Pass. Ry. v. Railway*, 38 Pa. St., 361; *Maia v. Hospital*, 97 Va., 507 (34 S. E. Rep., 617; 47 L. R. A., 577); *Patterson v. Patterson*, 59 N. Y., 574 (17 Am. Rep., 384); Angel, Limitations, Chap. 7.

By the statute the right to institute action is vested in the administrator—by virtue of his capacity as such—and not in the individual. It is, therefore, a condition precedent to the right of action that an administrator be in existence, upon whom this right may devolve. This is very fully established in the case of *Weidner v. Rankin*, 26 Ohio St., 522, brought by the widow and children.

In that case the defendant moved to vacate a verdict and judgment against him and for judgment *non obstante veredicto*, on the ground that plaintiffs were not authorized to sue. In the Supreme Court it was claimed by plaintiffs in error that the action was in the name of the real parties in interest; that the statute being remedial should be liberally construed; and that defendant had waived objections by failing to demur or answer specially. On the other side it was urged that the remedy was purely statutory; that, being in derogation of the common law, the statute must be strictly construed; and that the defect was not merely want of capacity to sue, but want of a cause of action. The court held with the defendant, first, that the right of action vested in the personal representative and not in the beneficiaries; also that the petition must contain a cause of action in favor of plaintiff, and that the objection was not waived by defendant by failure to demur, although the facts stated might construe a cause of action in favor of one not a party to the suit.

The application of these principles to the case at bar is manifest and conclusive. There was no cause of action in the plaintiff at the commencement of the suit. He had no right to bring suit,* nor power to institute process. Had the defect been cured before the right in the beneficiaries lapsed, it is possible that by liberal construction a *nunc pro tunc* effect could have been given to his subsequent completion of his appointment; and this principle is the principle disclosed in many of the authorities cited by the plaintiff here in support of the argument; but in the case at bar there was no cause of action existing when the correction was made, because the beneficiaries were legally defunct. In other words, the cause of action had lapsed, and, consequently, could not be revived. *Johnson v. Railway*, 7 Ohio St., 336, 339, 340. Consequently, the attempt to correct was of no legal effect.

The point is further made evident in *Pitts., C. & St. L. Ry. v. Hine*, 25 Ohio St., 629, wherein it is held that the limitation of two years "is a condition qualifying the right of action, and not a mere limitation on the remedy."

Also in *Wolf v. Railway*, *supra*, page 527, in which *Railway v. Hine*, *supra*, is approved and the matter restated briefly thus, page 529:

"It is, therefore, not a defense in the proper sense, but a necessary condition to the right of action."

That is to say: it is not a mere matter of defense that can be waived by a defendant, but is jurisdictional, because it inheres as a condition precedent in the right of action.

Upon the facts, therefore, and upon the law as clearly set forth by our Supreme Court, I am constrained to hold the plea good, and must, therefore, sustain the same.

Judgment for defendant, dismissing the petition.

D. T. Hackett and W. A. Rinckhoff, for plaintiff.

Outcalt & Foraker, for defendant.

*Administrator has no power to act before the grant of letters; his power is derived exclusively from his appointment. Woerner, Administration, Sections 409, 383.

WM. F. BORCK, ADMINISTRATOR, v. CINCINNATI GAS &
ELECTRIC CO.

1. City ordinances relating to the location of poles and the insulation of electric wires, etc., fall within the class of regulations established for the benefit of the general public only, and do not constitute a ground of private action for individuals not in the class intended to be protected thereby.
2. No cause of action arises in favor of a telephone lineman who goes upon the poles of an electric light company with its acquiescence, but as a mere licensee, to repair wires belonging to his employer, and who receives personal injuries as a result of the defective insulation of the wires of such light company.

HOSEA, J.

Demurrer to petition.

The material facts pleaded are that plaintiff's intestate, an employe of the City & Suburban Telephone Association, was injured by contact with a "tie-wire" of the wire system of the Cincinnati Gas & Electric Company, while standing on a pole of the latter company engaged in repairing wires of the telephone company strung above the wires of the gas and electric company. He avers that he was injured while in the proper discharge of his duty to the telephone company, and was upon the pole of the gas and electric company according to a usage and custom of the telephone employes in Cincinnati, which custom was established by consent and with the knowledge of said gas and electric company; and charges negligence of said company in the location of their poles and wires and failure to maintain proper insulation, in violation of an ordinance of the city of Cincinnati.

The demurrer challenges the sufficiency of the facts alleged to constitute a cause of action.

So far as the city ordinance relating to the location of poles and insulation of the wires is concerned, such regulations fall within the class established for the public benefit

only, and do not constitute a ground of private action for individuals, not of the class intended to be protected by such ordinance. Shearman & Redfield, *Negligence*, Section 13, 13a; *Clev., A. & C. Ry. v. Workman*, 66 Ohio St., 509, 542; *Erie Ry. v. McCormick*, 69 Ohio St., 45, 52.

The ordinance therefore may be treated as a negligible quantity, for these and other reasons to be stated.

In the case of *Clarke v. Telephone Assn.*, 16 Dec., —, I called attention to the very different measure of duty and obligation as between such companies maintaining electric wire systems in public streets, toward the public, and as between themselves. This difference grows out of the relative character of negligence as depending upon "some circumstance of time, place, or person" (*Needham v. Railway*, 37 Cal., 409, 410); and of the further and consequential fact that the omission of duty is not a predicate of actionable negligence unless it results in injury to one for whose protection the duty is imposed; and this implies to duties imposed by ordinance as well as those imposed by rules of general law. *Burdick v. Cheadle*, 26 Ohio St., 393; *Erie Ry. v. McCormick*, 69 Ohio St., 45.

The plaintiff's decedent was not injured while using the streets for the ordinary purposes of travel as one of the general public. Had this been the case he would have been entitled to all the protection which the law affords the citizen as against dangerous agencies maintained in the streets. He was, when injured, upon one of the poles of the gas company and the injury was in consequence of his being there. The allegation is that he was there by a custom of the telephone employes acquiesced in by the gas and electric company. This constitutes him a mere licensee, and he had the rights—and only the rights—of a licensee upon the premises of another.

This circumstance, as a factor in negligence cases, was fully discussed by Judge Boynton in the leading case of *Pittsburgh, Ft. W. & C. Ry. v. Bingham*, 29 Ohio St., 364, where there is an interesting citation and analysis of the authorities, beginning with the "Stone Quarry" case of

Hounsell v. Smith, 7 Com. B. (N. S.), 731, in which it was held that:

"The person so traveling over such waste lands must take the permission with its concomitant conditions and, it may be, perils."

This able opinion of Judge Boynton has been cited and his views approved in later cases. *Cin., H. & D. Ry. v. Aller*, 64 Ohio St., 183, 192; *Clev., A. & C. Ry. v. Workman*, 66 Ohio St., 509, 539; *Ann Arbor Ry. v. Kinz*, 68 Ohio St., 210, 222. In the latter case the rule is thus stated:

"The owner * * * of land is not bound to take pains to prepare his premises in any particular way to the end of promoting the safety of * * * trespassers or as bare licensees; but * * * they take the premises as they find them, and if killed or injured by reason of the condition in which they find them, this does not give a right to an action for damages." Citing 1 Thompson, Negligence, Section 1025*b*.

Upon these authorities it seems to me clear that the demurrer must be sustained, and it is so ordered.

Demurrer sustained.

Thos. L. Michie, for plaintiff.

Smith Hickenlooper, for defendant.

HENRY APPEL v. COOPER INSURANCE CO.

A provision in a policy of fire insurance that no suit should be brought thereon "unless commenced within six months next after the fire" will, in the absence of circumstances showing the limitation to be harsh and oppressive upon the insured, be conclusive upon the plaintiff.

HOSEA, J.; FERRIS and HOFFHEIMER, JJ., concur.

Error to special term.

All questions arising upon the proceeding in error in this cause have been determined in the case of *Fire Association of Philadelphia v. Appel*, 16 Dec., —, excepting only the question peculiar to this action, namely, that relating to the limitation of time as to entering suit; and the opinion heretofore rendered in those cases may be taken as applicable here.

The residual question arises in this case upon a provision in the policy as follows:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months after the fire."

The policy also contains provisions with respect to furnishing proofs of loss, and, in case of disagreement, for submission of the questions of sound value and damage to appraisers or arbitrators, and providing that the sum so found to be due shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by defendant, including an award where appraisal has been required—such proof of loss to be made within sixty days after the fire.

The fire occurred on September 9, 1901, and upon disagreement between the company and the insured the arbitration was duly entered upon September 18, 1901; and an award made and returned by the umpire and one appraiser (the other having withdrawn and refusing to proceed) on October 9; and "proofs of loss" were filed on October 10, 1901. Suit was begun on June 4, 1902, about forty days after the expiration of sixty days succeeding the filing of the "proof of loss."

The referee to whom the case was referred below, finding the facts to be as in substance stated above, held as a matter of law that the plaintiff could not recover because he had failed to enter suit before March 9, 1902, that being the expiration of the time limit of six months from the date of

the fire, allowed by the policy to the assured, and this was affirmed by the court below.

The plaintiff in error seeks in this proceeding a reversal of this judgment, and counsel present an imposing array of authorities, some of which hold such limitations void because of harshness evidenced by the circumstances of the case; others modifying by construction the import of the provision so as to begin its operation only after the right of action accrues after filing proofs of loss; and another holding such limitations void as against the public policy evidenced by ordinary statutes of limitation.

The defendant in error, with equal zeal of counsel, presents a line of authority of no less cogency holding to the ordinary rule of construction that where parties have put in clear, unambiguous language the terms of the contract by which they agree to be bound the court can not create a new contract between the parties by a construction not intended by themselves.

We think the true rule of decision in the present case lies somewhat between these extreme viws, and is that the contract is to be upheld and enforced according to its terms, unless—and the burden is upon him who seeks to establish an exception to the rule—circumstances of a controlling nature are shown which would make an application of the rule manifestly unjust.

In the former opinion referred to, as against an equally binding stipulation, we found that the acts of the companies had practically rendered performance impossible for the insured and thereby excused performance. In the present case no such conditions appear to exist.

The only direct utterance of our Supreme Court upon the question, of which we have knowledge, is in *Portage Co. Mut. Fire Ins. Co. v. West*, 6 Ohio St., 599, 600, where a similar limitation existed in the charter of a mutual insurance company, and was challenged under a policy issued to one of its members. The court considers various reasons making an early adjustment of losses and liability desirable in the case of mutual insurance companies—and on principle they apply with same force to all—and, treating

the policy of the member as a contract embodying this stipulation, says, page 604 :

"The plaintiff's liability to a suit, by what we have seen should be treated as terms of the contract, which the insured accepted for their protection against the loss, was limited to a period of time clearly specified, and it could not, after that limitation expired, be answerable to the defendants on their policy of insurance."

It appears from the record in the case at bar that the company was served with proof of loss on October 10, 1901, subsequent to the termination of the arbitration proceedings; and that the company almost immediately and without availing itself of its sixty days privilege, announced its attitude denying liability. There remained to the insured then nearly five of the six months limitation of time in which to bring suit. There were tentative efforts to bring about a compromise, but no definite negotiations that can be taken into account as a suspension; and no other circumstances indicating that the limitation was in fact harsh or oppressive upon the insured. In the absence of such facts we can but affirm the judgment below upon the rule established in *Portage Co. Mut. Fire Ins. Co. v. West*, *supra*, and the general principle above stated, namely: that the stipulations of a contract otherwise valid are to be upheld unless shown to be unfair and unreasonable. 1 Page, Contracts, 356.

The question suggested by the holding that such stipulations are invalid as against public policy, lately decided by the Court of Appeals of Kentucky, is an interesting one and may derive force from the decision of our Supreme Court in *Balt. & O. Ry. v. Stankard*, 56 Ohio St., 224, holding that the right of appeal to the courts is in its nature inalienable and can not be bargained away (citing Section 16, Article I, Ohio Constitution). This question, however, is not properly before us on this record.

The judgment below must be affirmed, and is so ordered.

Frank Seinsheimer and *John R. Sayler*, for plaintiff.

J. H. Cabell and *J. L. Kohl*, for defendant.

CINCINNATI, COL. & W. TPK. CO. v. CINCINNATI & COL. TRAC. CO.

1. Jurisdictional questions will be determined by the courts, *sua sponte*, whether raised by the litigants or not. Jurisdiction can not be acquired by consent.
2. Where equity has jurisdiction of the person it will, as a general rule, entertain suits involving contracts of conveyance or other obligations of a like nature relating to an extra-territorial *corpus*. But this rule is not applicable to extra-territorial torts, except where some act of the person can sufficiently execute the decree, or where imprisonment of the person is the most proper means to enforce performance. The *locus in quo* must be within the absolute jurisdiction of the court.
3. Compensation in money need not be made in advance before private property can be taken for the purpose of making or repairing roads which shall be open to the public without charge; it is sufficient, in such cases, that provision be made by law for compensation so that the owner may secure compensation if he desires. This rule applies to existing toll roads owned by a turnpike company, which become streets by reason of being included within territory subsequently annexed to a municipality.
4. The annexation of territory including a roadway owned by a turnpike company, and its continuous use as a street, makes it a public street within the meaning of Section 4391, Revised Statutes, as amended April 4, 1880 (75 O. L., 90), which provides that where a tollgate is brought within a municipality by the extension of the corporate limits, the tollgate shall be removed to a point not nearer to such limits than eighty rods, and so much of such road as is included in the annexed territory shall become a public street; and, as the intention of said amendatory statute is, in such cases, to divest turnpike companies of such portion of their property, and as a duty is devolved upon village councils to take full and entire supervision and control of all public highways, bridges, etc., within the corporate limits, the turnpike company does not, after such annexation, have such a title to such portion included within the corporate limits as will entitle it to an injunction against a trespass, committed or threatened, by a street railway company. [Reversed as to this point only by the Supreme Court.]

HOSEA, J.; SMITH and FERRIS, JJ., concur.

Reserved from special term.

The plaintiff alleges its ownership of a turnpike extend-

ing from the eastern corporation line of Cincinnati to and through the village of Milford and beyond; and that the defendant is proceeding to distribute rails and ties along and upon the roadway of plaintiff, in and through said village with a view to the construction of a street railway thereon without its consent; and prays for injunction.

A temporary order was granted, as of course, and the cause brought on for final hearing upon issues formally made in pleadings duly filed, and was reserved to the general term for argument and determination, upon the pleadings and bill of evidence.

Defendant answers, among other things, that on May 9, 1888, the village of Milford was extended to include the portion of the plaintiff's turnpike west of the Miami river to the crossing of the turnpike under the Little Miami railroad, a distance of about 1750 feet, which then and thereafter became a public street of said village; that prior to and until said extension, plaintiffs had maintained upon said portion of the turnpike, a tollgate which was then removed.

For the purpose of the present case further recitals of the pleadings will be unnecessary.

The testimony establishes these facts together with the further fact that a considerable portion of the village of Milford lies in Clermont county, which is divided from Hamilton county at that point by the Little Miami river; and only that portion of the turnpike, namely, the 1750 feet above referred to, lies in Hamilton county. :

These facts raise an important jurisdictional question not considered in the argument, but which must be determined at the outset, for consent can not give jurisdiction. The suit being to enjoin trespass upon lands, the question is, whether the court has jurisdiction as to lands outside the county.

Undoubtedly, the general rule in respect to contracts of conveyance or other obligations of like nature, relating to an extra-territorial corpus, is, that equity will entertain such suits where it has jurisdiction of the person; but, as was said by Lord Nottingham in *Carteret v. Petty*, 2 Swanst., 324, speaking of jurisdiction in cases of extra-territorial torts:

"All this is to be understood of cases where imprisonment of the person is the most proper means to effect that which is decreed to be done, viz., the payment of money, making a conveyance and the like. But when no obedience of the person or any act of his can sufficiently execute such a decree, then it is vain to hold such a plea."

This is quoted with approval in *Morris v. Remington*, 1 Par. Eq. Cas. (Pa.), 387, 391, which is a leading case on the subject in this country. The following from the syllabus will sufficiently indicate its character as an authority, premising that the suit was to enjoin defendant from committing a nuisance affecting plaintiff's land in another county, by diversion of a water-course, and that demurrer to the jurisdiction was sustained.

"Where imprisonment of the person is the most proper means to effect that which is decreed to be done, viz.: the payment of money, making a conveyance or the like, the jurisdiction is local. But where no obedience of the person or any act of his can sufficiently execute such a decree, then jurisdiction is not local.

"To justify a court of chancery in exercising jurisdiction in case touching lands in foreign counties, the relief sought must be of such a nature as the court is capable of administering in the given case. * * * To give a complete remedy in case of nuisance, in a court of equity, it must include the restraint and prevention of the contemplated nuisance, the removal of such nuisance when perpetrated, and compensation in damages for injuries resulting from such nuisance, in such cases. Nor must restraint and removal fall short of doing entire justice to the party aggrieved. * * *

"But for a court of equity to give this ample relief, the *locus in quo* must be within the absolute jurisdiction of the court."

The discussion, in the case cited, reviews all the leading authorities and is most complete and satisfactory.

The application of the doctrine to the case at bar, eliminates all considerations affecting that portion of the turnpike lying in Clermont county, and confines attention to

the 1750 feet included within West Milford in Hamilton county; and as to this portion, we think the case is governed by Section 3491, Revised Statutes.

Prior to 1880, this statute provided in substance that: Where, by the creation of a village or the extension of its limits, a tollgate is brought within such limits or within eighty rods thereof, it should be removed, etc., and compensation made therefor. On April 4, 1880, Section 3491, Revised Statutes, the statute was amended by the insertion of new matter, so as to read as follows [the new matter being shown in italics]:

"No company shall hereafter erect a tollgate and collect tolls within the limits of any city or village or within eighty rods of such limits; and where, by the creation of a village, or the extension of the limits of a city or village, a tollgate is brought within such limits, or within eighty rods thereof, the company shall remove the tollgate to a point on its road not nearer to such limits than eighty rods, *and so much of its road as is included within the limits of such city or village shall become a public street, and be kept in repair as other public streets; but no toll shall be taken thereon;* but compensation shall be made to the company for the damages it will sustain by reason of such removal of its tollgate, *and surrender of such part of its road,* and if the company and the proper authorities of the city or village do not agree thereon, the damages shall be ascertained in proceedings which the municipal authorities shall commence, to appropriate such property to the use aforesaid, in the manner provided by law, for the appropriation of property by municipal corporations, or, in default of such agreement, or the institution of such appropriation proceedings, the company, at any time after the removal of the tollgate, may recover the same from the city or village, by civil action."

The cases cited^d by plaintiff in support of the contention that it was not the intention of this statute to divest turnpike companies of their property, were decided upon the law as it existed before the amendment of April 4, 1880, Section

3491, Revised Statutes, was made. Citing them to the present law seems to be an anachronism. The amended law clearly indicates the intention, and upon the facts of this case the application is also clear. A similar construction and ruling was made upon a similar statute in *Tremainsville Plankroad & Tpk. Co. v. Toledo*, 31 Ohio St., 588, wherein the question of the constitutionality of the law was touched upon, though not strenuously urged in argument. The objection that compensation must be made in money before the property of the citizen is taken for public uses, does not apply to property taken "*for the purpose of making or repairing roads, which shall be open to the public without charge.*" Section 19, Article I, Constitution.

It has been repeatedly held, in such cases, that it is not necessary to make compensation in advance, but it is sufficient if provision be made by law for compensation so that the owner may have compensation if he desires. *Bates v. Cooper*, 5 Ohio, 115; *Toledo v. Preston*, 50 Ohio St., 361; *Joyce v. Barron*, 67 Ohio St., 264, 272.

The word "making," as used in the constitutional provision above cited, has been construed, in a similar context in a statute, to include, "or otherwise becoming possessed," thus covering the acquirement of roads already existing. *McIlvaine, C. J.*, in *Extension of Lower River Road Co. v. Riverside (Vil.)*, 25 Ohio St., 658, 666.

It was and is the duty of village councils to take full and entire supervision and control of all public highways, bridges, etc., within the corporation; and the fact of annexation of territory including a roadway, and its continuous use as a street, constitutes it a public highway under the law. *Steubenville v. King*, 23 Ohio St., 610.

Under the statute and authorities cited, we are of opinion that the plaintiff has not shown such title as is required as a basis of injunction; and the temporary order must be dissolved and the petition dismissed; and it is so ordered.

C. W. Baker, for plaintiff

Burch & Johnson for defendant.

THE JOHN SHILLITO COMPANY v. GEORGE B. FOX.*

STATEMENT.

Fox was asked by the Book, etc., Co., of Chicago, which furnished books for sale in the book department of the Shillito Co., to become surety for it in replevin against an attachment of the books as the property of another company. To induce Fox to do this the Book Company wrote him that it has arranged with the Shillito Company, which was one of the defendants in the replevin suit, to secure him against loss.

Fox accordingly went to the office of the Shillito Company and stated his errand. He was informed that an arrangement had been made to protect him and was introduced to one Dawson, the general superintendent, and told that "he had the matter in charge and that any arrangement I would make (with him) would be all right."

Dawson told Fox the books, though in the store, were in the sheriff's hands, and "the Shillito people were very anxious indeed to have the books sold," "the busy time of the year was coming on," etc. "He then said that they had the authority to secure me if I gave a bond and would do so." "He said it would be perfectly safe." "We will see that you are kept harmless and to the extent of the amount that we have in our possession." This he said was "about \$7,000."

"Q. What did he say the Shillito Company would do if you went on the bond?

"A. To hold all there was there to secure me and to sell the property; they wanted it released so that they could sell, and hold the proceeds or the books—all of it was to be held.

"Q. Either the proceeds or the books?

"A. Either the proceeds or the books."

* Affirmed by Supreme Court, 75 O. S. —.

Thereupon Fox went to the court house, gave the bond and then "returned to the Shillito place and told Mr. Dawson that the bond had been executed and that he could now proceed to sell the books." "He said that they would proceed to do it and would see that I was harmless." The books were thereupon surrendered by the sheriff to the Shillito Company.

Afterward Fox received a letter from the Shillito Company asking him to call, which he did. Dawson then said the Chicago people "were very anxious to have this amount reduced from \$7,000 to about \$5,000, arguing that that would be sufficient to make me safe." But Fox refused to consent, saying "it was a matter for them to determine. I looked upon the Shillito concern as being responsible to me, and that if they did it they did it at their peril."

It is not disputed that Fox was compelled and did pay the amount sued for and recovered on the bond, nor that the Shillito Company realized more than that sum from the sale of the books in its possession when it promised the indemnity. This is also admitted on the pleadings.

In addition to having the books in its possession the Shillito Company also had an agreement from the owners to indemnify it against loss by the reason of indemnity, by virtue of which the owners paid the fees of Maxwell & Ramsey for defending the Henderson-Achert Company suit.

The case was tried before Judge Ferris, with verdict and judgment for plaintiff Fox below.

Per Curiam.

The majority of the court are of opinion that there is no material error in the proceedings and judgment in the court below, as shown by the record, and with respect to special charge No. 5, upon which the only difference of opinion arises (requiring the defendant in error, Fox, to prove affirmatively the authority of Dawson to make the contract binding on the company), are of the opinion that said charge was properly refused, because it necessarily

excludes all consideration by the jury of the testimony tending to show acceptance of benefits with knowledge, and other facts tending to show ratification (Cook on Corporations, Sections 1792 to 1798, inclusive).

The judgment of the Special Term must, therefore, be affirmed, and it is so ordered.

HOSEA and HOFFHEIMER, JJ., concur. LITTLEFORD, J., dissents with respect to special charge No. 5, which, in his opinion, should have been given, upon the authority of *Bradford Belting Co. v. Gibson*, 68 O. S., 440.

Judgment affirmed.

Robert Ramsey, for plaintiff in error.

Judson Harmon and C. B. Wilby, for defendant in error.

JOHN H. FREY v. PAUL M. MILLIKIN, AUDITOR.

1. While an ordinance prohibiting any person having the right to tap a public sewer from draining property adjacent to their own by means of pipes or other communications may not apply where both the adjacent and abutting property is owned by the same person, yet the prohibition extends to the adjacent property after its conveyance to another person.
2. The adequate local drainage for the usual purposes of sewerage, required by Section 2380, Revised Statutes (repealed, 96 O. L., 99), in order to exempt property from a sewer assessment, includes both permanency of physical structure, and control. Hence, a lot which has never been assessed for the construction of a sewer, and has no sewer connection except that it is drained by its owner by means of a private connection across another of his lots which has a direct and proper connection with a city sewer, which private connection is manifestly against the policy of an ordinance regulating the use of sewers, and exists only by the doubtful authority of one who has control only in his own right, which right of connection would cease altogether by the conveyance of such lot to another person, does not show such an adequate local drainage as will exempt it from an assessment to pay the costs of constructing another sewer.

HOSEA, J.

Injunction.

Plaintiff owns two lots and part of a third in the Burnet and Reeder subdivision, fronting on the west side of Burnet avenue and extending one hundred feet westwardly. Lot No. 492, containing a dwelling, lies along the south side of Goodman street, while lot 493, and a fraction of 494, contain another dwelling and adjoin No. 492 on the south.

Lot No. 492 was assessed for a city sewer built in Goodman street to and somewhat beyond the rear line of the lots from the west, and a private sewer built over lot 492 at the rear, connects both houses with the city sewer on Goodman street.

Plaintiff claims exemption for both the properties, under Section 2830, Revised Statutes (repealed, 96 O. L., 99), as against assessment for the sewer built on Burnet avenue, alleging that said premises are completely provided with "local sewerage and that he is neither in need of nor can he use the Burnet avenue sewer."

There is no testimony showing that the Burnet avenue sewer can not be used by either of these properties, and the sole question for determination is whether the private connection across lot 492 is such a provision for "local drainage" as will sustain the exemption under the statute.

As to lot 492 there can be no question but that the claim of plaintiff is well founded. It has a direct and proper connection with a city sewer in a street upon which the lot abuts, and for which the lot has been assessed and has paid its proportionate share of the cost. This exemption I understand to be conceded, by counsel for the city.

Lot 493 and its extension, considered as one lot, stands however in a wholly independent relation. It has no sewer connection except a permissive one into the branch connection of lot 492. Lot 493 paid nothing toward the cost of the Goodman street sewer which was assessed against abutting lots (Section 2379, Revised Statutes). Its sewer needs are quite independent of the accident of ownership. The right of plaintiff to tap the Goodman street sewer was by

virtue of his ownership of lot 492, which abutted on Goodman street, and the connection extended thence to lot 493 was at least a technical violation of an ordinance of the city, existing since 1860, and reading as follows:

"Section 4. Any person having the right to tap any public sewer, who shall by means of pipes or other communication drain the cellars or vaults situate on property adjacent to their own, shall, upon conviction thereof in the police court, pay a fine not to exceed \$100, and upon second conviction for the same offense shall be debarred from the further right to drain into said sewer." (Cop. & Hert. Ord., 703.)

Whether or not this can be held to apply where the adjacent property is owned by the party having the right of sewer connection, it certainly would apply the instant the adjacent property passed into other hands. In other words, the permission can not be perpetuated, even by contract, and may cease at any moment. I do not think it can be maintained that a mere private connection across other lots can, in view of the city ordinance above cited, be regarded as fulfilling the statutory requirements. A careful reading of *Wewell v. Cincinnati*, 45 Ohio St., 407, and of *Ford v. Toledo*, 64 Ohio St., 92, leads to the conviction that the "*adequate drainage for the usual purposes of sewerage*" required to "work an exemption for the land from assessment" (*Ford v. Toledo, supra*, page 98) includes not only the idea of permanency of physical structure, as intimated by the court (*Wewell v. Cincinnati, supra*, pages 422, 423), but of control. I do not think a connection manifestly against the policy of the local law, and which exists only by a permission of doubtful authority of one having control only in his own right in respect to other property can be held to a proper basis for exemption.

The injunction must, therefore, be continued and made permanent as to lot 492, but dissolved and set aside as to lot 493 and thirteen feet of lot 494, and it is so ordered.

C. K. Shunk, for plaintiff.

C. W. Scott, Assistant City Solicitor, for defendant.

CATHERINE BRIGEL v. LEO A. BRIGEL ET AL.

1. A party having inconsistent remedies, created by law or contract, for the enforcement of a right, must elect which one he will pursue; and after having made his election, and by words or acts expressed it in a manner suited to the particular case, he can not reverse it; having elected to pursue one remedy, he waives the others. Equity follows the law in this respect.
2. The payee of three notes secured by the same collateral, two of which are signed by the maker alone, and the third with his wife as surety, will be held to have elected to have the collateral applied toward the payment of the third note, so far as the surety is concerned, by commencing foreclosure proceedings thereon against the maker and surety; in which he asks that the collateral be sold and applied toward the payment of such note; and he can not thereafter, to the prejudice of the surety, have the collateral subjected to the payment of the other two notes, although they matured earlier than the third.
3. The holder of a promissory note, between whom and the principal debtor the consideration passed, is presumed to know that a third party, who signed as surety, was in fact a surety.

SUPPLEMENTAL.

4. The mere passive delay of the holder of a note to enforce its payment against the principal will not release the surety; but, if the holder, after having taken the property of the principal debtor into his control by legal process, or otherwise, with respect to the debt, voluntarily releases it, he thereby discharges the surety to the extent of the value of such property. The surety's right of release, in such case, does not depend upon contract with the holder, but upon the theory that it is inequitable for the latter to knowingly prejudice the rights of the surety against the principal.

HOSEA, J.; FERRIS and HOFFHEIMER, JJ., concur.

Error to special term.

In this case three notes, two of them at one and two years respectively by Leo Brigel, individually, and the third at three years by Leo Brigel and his wife, Catherine M. Brigel—the wife being certified here as surety—were signed

and delivered on the same day to Jerome D. Creed, each note being secured by the same collateral, viz.: seven hundred and thirty-five and one-fourth shares of the capital stock of the Jackson Brewing Company.

The notes remained in the hands of Creed, but after maturity of all the notes, on March 17, 1893, he brought two suits against Brigel and his wife upon the last mentioned note—one in foreclosure to subject the security, and one to obtain a personal judgment.

Both suits were prosecuted to final judgment and a decree was taken in the foreclosure suit finding the amount due and ordering sale of the stock and payment therefrom of the decree and costs unless paid within ten days by the parties. On error proceedings the decree in the first suit was affirmed and judgment in the second suit was reversed and petition dismissed by the Supreme Court. The stock in question was subsequently sold in a different proceeding under judgment obtained by E. W. Kittredge against Leo Brigel, and the proceeds of said sale are in the hands of a receiver of this court in case No. 48357. The contention of the plaintiff here is that the proceeds of the sale should be applied in the first instance to the payment of the judgment recovered on the note on which she is surety; while Creed claims the right to apply the proceeds to the individual notes of Brigel above mentioned which matured earlier; and the court below sustained the latter contention.

Had Creed sued upon the individual notes of Brigel in the first instance and attempted to subject the stock to the exclusion of the surety, the plea of his right of election might have raised a contest of a different nature and necessitated a close inquiry into the actual facts and circumstances relating to the execution of the notes and the understanding of the parties as affecting the rights of the surety, which inquiry, however, is not necessary here. We think the case as presented may be shortly disposed of under well-established rules.

Granting, for the purposes of this case, that Creed, the payee of the notes, had in the first instance the right to apply the common collateral to the payment of the notes in

their order of maturity or otherwise, as he should see fit, yet as to Catherine Brigel it was a right of election governed by legal rules.

It is an ancient maxim of the law that when an election is once made and pleaded the party making it is concluded—*electio semel facta et placitum testatum non patitur regressum* (Co. Litt., 146a).

As expressed by Lord Campbell in *Brown v. Insurance Co.*, 1 Ell. & Ell., 835:

“Where a contract provides for an election the party making the election is in the same position as if he had originally contracted to do the thing which he elected to do.”

Blackburn, J., in *Ward v. Day*, 4 Best & Sm., 356, refers to it as “a rule which is a branch of the general law that where a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before the party having the option acts he must elect once for all whether he will do the act or not.” See also, *Spreed v. Morgan*, 11 H. L. Cas., 615; Bigelow, Estoppel, 562, 568.

Whenever by law or contract a party has laid before him a variety of steps, the taking of one of which excludes the rest, he must choose between them. After his choice is made, and by words or acts expressed in a manner suited to the particular case, he can not reverse it. Having elected to take one step, he is held to have waived the others. Bishop, Contracts, par. 808.

Equity follows the law and the rule is enforced as one resting in manifest justice under the principle that one who seeks equity must do equity. One is not permitted to take a benefit under an instrument and then repudiate it. Bispham, Equity, par. 306; Perry, Trusts, 596; *Bryan v. Kennett*, 113 U. S., 179, 198 (5 Sup. Ct. Rep., 407; 28 L. Ed., 908).

Creed, by bringing suit in foreclosure against Brigel and wife upon the debt evidenced by the third note in question, and asking the court to decree the stock to be sequestered and sold in discharge of said debt, made his election in a

formal manner and brought himself literally within the terms of the maxim quoted. He is concluded by it effectually, because Mrs. Brigel's obligation is extinguished and merged in the decree and the security is no longer free, but is an inseparable incident of that decree and is vital to it. This, we apprehend, is the meaning of the action of the Supreme Court in dismissing Creed's suit for personal judgment after he had elected his remedy of foreclosure and prosecuted it to a final decree, and of the language of the court in saying of Mrs. Brigel that, although she was not certified as surety in the foreclosure suit, yet that "the order for the sale of the stock and its application to the debt, * * * substantially secures to her the benefits of this provision of the statute." *Brigel v. Creed*, 65 Ohio St., 40, 46.

In a word, the question in issue here, so far as relates to Mrs. Brigel, is *res adjudicata* (Freeman, Judgments, par. 249).

For these reasons the judgment below, so far as Mrs. Brigel is concerned, must be reversed and the cause remanded for the entry of judgment in accordance with the views herein expressed, and it is so ordered.

[The case having been subsequently considered on motion for rehearing, the court announced the following.]

SUPPLEMENTAL OPINION.

Supplementing the views expressed in the former opinion, it is to be noted, that, notwithstanding Mrs. Brigel was not certified as surety in the foreclosure decree in case No. 48607, yet she was in fact a surety by reason of the circumstances under which the debt was created—the joint liability of herself and husband being upon a note given exclusively for the husband's debt. *Smith v. Sheldon*, 35 Mich., 42 (24 Am. Rep., 529).

Creed, being the holder of the note, between whom and the principal debtor the consideration passed, is presumed to know that Mrs. Brigel signed as surety. *Cummins v. Little*, 45 Me., 183; *Ward v. Stout*, 32 Ill., 399.

But in this case there was actual knowledge of the fact on Creed's part because these notes were given in renewal of, and substitution for, an earlier note of Brigel's, and in compliance with Creed's demand for additional security. Unquestionably, therefore, Creed was bound to recognize Mrs. Brigel's right as surety; and, while it is true that mere passive delay on his part to enforce the debt against the principal would not release the surety, yet the rule is well settled, that, if the creditor, having taken the property of the principal debtor by legal process or otherwise into his control with respect to the debt, voluntarily releases it or gives it up, the surety is thereby discharged. *Downer v. Bank*, Wright, 477; *Dixon v. Ewing*, 3 Ohio, 282 (17 Am. Rep., 591); *Findlay v. Bank*, 10 Ohio, 59; *Farmers Bank v. Reynolds*, 13 Ohio, 84, 85; *Dye v. Dye*, 21 Ohio St., 86.

In *Day v. Ramey*, 40 Ohio St., 446, 449, the rule is very clearly stated as follows:

"If the creditor has the means of satisfaction in his hands, and chooses not to retain them, he can not complain. The rights of sureties are largely creations of equity, and courts of chancery will not hold them liable, where the risk is increased by the act of the party for whose benefit the suretyship is intended to inure; and, if by the act of the creditor, the surety is injured or exposed to injury, that act may be laid hold of for the surety's relief." (Citing authorities.)

The right of release, it may be observed, does not depend on any contract with the creditor, but upon its being inequitable in him to knowingly prejudice the rights of the surety against the principal. *Pooley v. Harradine*, 7 Ell. & Bl., 431.

Creed, having possession of the stock from Brigel, with power of sale, appropriated it to the particular note in question and obtained a decree ordering it to be sold in satisfaction of a finding and judgment upon said note against Mr. and Mrs. Brigel. Subsequently, he permitted the stock to be sold in another suit to which he was a party; and now, in the present suit, he obtains a judgment against

Mr. Brigel, upon other notes with which Mrs. Brigel has no connection, and an order distributing the proceeds to himself in satisfaction of said judgment, thereby affirming the sale and application of proceeds.

These proceedings constituted an abandonment of his right or lien against the stock, so far as the foreclosure suit is concerned, which inures in favor of Mrs. Brigel *pro tanto*, to the extent of the full value of the security thus released. As the sale of the stock, made at less than one-third of its par value, produced considerably more than the face of the finding and judgment rendered upon the note on which Mrs. Brigel was surety, it seems probable that, upon final adjustment, it will be found to completely satisfy and discharge the judgment *in toto*. In drafting the judgment entry, therefore, the suggestion of the court in *Dixon v. Ewing, supra*, will be followed, and provision inserted enjoining any proceedings to enforce the judgment in cause No. 48607, pending the disposition of the stock or other determination of its value as a measure of credit or satisfaction in favor of Mrs. Brigel in relation to the judgment in said cause No. 48607.

W. B. Stier, for plaintiff.

Maxwell & Ramsey and *Kittredge & Wilby*, for defendant.

STANDARD LIFE & ACCIDENT INSURANCE CO. v. JOHN R. SAYLER, EXECUTOR.*

1. An insurance company doing a business of "life" and "accident" insurance, unless an assessment company, is within the purview of Section 3625, Revised Statutes, relative to the materiality of a false answer made by applicant, and also of Section 3626, Revised Statutes, creating an estoppel as to certain defenses.
2. An answer, in a suit on a policy of insurance, alleging a misstatement in the application therefor and that it was false, material, and that the policy was issued in reliance thereon, is

* Affirmed by Supreme Court, 73 O. St. 340.

insufficient to constitute a defense; it should also allege wilfulness and fraud on the part of the applicant and want of knowledge on the part of the agent or company

3. Testimony that plaintiff was blind in one eye and that his vision in the other was defective, such condition being of such a character as to be visible to every one, is not sufficient to show fraudulent intent in plaintiff in answering that he had no bodily or mental infirmity.
4. Section 3626, Revised Statutes, which estops an insurance company from defending an action on an insurance policy on the ground of misstatements by plaintiff made at the time of application, if three annual premiums have been since paid, will include within its purview, policy contracts issued in place of old policies on which three such payments have been made. Such contracts must be regarded as renewals of the old policies, and not as new ones.

HOSEA, J.; HOFFHEIMER and CALDWELL, JJ., concur.

Error to special term.

The executors of William Stacey, deceased, filed a petition in the Superior Court of Cincinnati, upon two policies of insurance issued by the Standard Life & Accident Insurance Company, of Detroit, Michigan, to William Stacey, of Cincinnati. Both policies covered loss of time resulting from bodily injuries suffered during the term of said insurance by external, violent and accidental means, disabling the insured; and if death resulted within ninety days from such bodily injuries as the proximate cause and sole cause thereof, then the company was to pay \$5,000 on each policy to his executors.

William Stacey died on the morning of June 17, 1901, as a result of bodily injuries caused by external, violent and accidental means as the proximate and sole cause thereof, during the term of the policies.

The petition further alleges that William Stacey and his said executors duly performed all the conditions of said policies on their part to be performed; that due and immediate written notice was given to the company at Detroit, Michigan, of the accident and injury causing death; and thereafter, within two months from the death of William Stacey,

to-wit, on or about July 17, 1901, direct and positive proof of his death was furnished to said company at Detroit, Michigan; that payment of both policies has been demanded, but that no part thereof has been paid; and the said executors, plaintiffs below, prayed judgment against the Standard Life & Accident Insurance Company, of Detroit, for the sum of \$10,000, with interest from October 17, 1901.

The insurance company answers, among other things, that each of said policies contained certain statements, which are part of the contract of insurance as a condition that if untrue in any respect, the policy shall be null and void; said statements being as follows:

"I have never had any fits or disorders of the brain, vertigo, or hernia, or any bodily or mental infirmity or disorder as herein stated. My habits of life are correct and temperate, and I am in sound condition mentally and physically, except as herein stated."

And the company avers that William Stacey, at the time of the acceptance of said policy, did have a bodily infirmity, in that he was practically blind in one eye and the sight of the other was impaired; that said representation was therefore untrue and was material, and the said policies of insurance would not have been issued had the truth been disclosed to the insurance company; that by reason of said statement and reliance thereon, the insurance company issued to the said William Stacey said policies as a select risk, meaning thereby the highest amount of insurance for the least amount of money of any class of insurance issued by the company; that had the fact been disclosed that he was blind in one eye, he would have fallen under the company's classification known as "cripples," which, under the company's rules, can only be insured at an advanced rate upon special application at the company's principal office; and by reason of said untrue statement said policies are null, void and of no effect.

The executors, by reply, admit that so much of the answer as purports to be copied from the policies of insurance is correctly copied, and that the statements of the

said William Stacey in his application for the said policies as recited therein did not contain a statement that he had either of said infirmities or disorders; and deny every other allegation contained in the said answers.

For a second reply the executors allege that the company is estopped from defending on the grounds set out in said answer, for the reason that the said William Stacey became insured under policy No. D.171774 on July 25, 1892, and under policy No. D.175401 on November 5, 1892, and continued such insurance and said premiums on said policies down to and including the premiums due in July, 1899, and November, 1899, respectively, carrying said policies in force until in July, 1900, and November, 1900, respectively, when the policies sued on were at the instance of the said company issued to William Stacey in place of said former policies and for the purpose of and thereby continuing his said insurance.

The insurance company, defendant below, filed demurrers to the second ground of replies so filed by plaintiff below, which demurrers were fully argued and overruled.

Subsequently the case came on for trial before the court and a jury, and after the testimony was submitted upon both sides, and after the court had passed on the admissibility of certain evidence offered by the insurance company, the court instructed the jury to return a verdict for the plaintiff below for \$11,400.

The errors assigned are:

1. The sustaining of the demurrers to the replies.
2. Construing the policies of 1900 as renewals of the policies of 1892 and admitting evidence thereof.
3. Excluding testimony offered by defendant company and directing a verdict,

The real questions for determination here arise under Sections 3625 and 3626, Revised Statutes, which provide as follows:

Section 3625. "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall

bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made; that it is material and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer."

Section 3626. "All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age."

It is claimed in behalf of plaintiff in error that these sections are limited in their operation to ordinary "life" companies and do not apply to so-called "accident" companies. But a careful reading of Chapter 10, Revised Statutes, in which these sections occur, satisfies us that the company doing a business of "life" and "accident" insurance is within the purview of these sections, excepting assessment companies provided for in Section 2630, Revised Statutes, which, by the terms of the act, are excepted from the operation of the laws relating to life insurance companies. *State v. Protection Assn.*, 26 Ohio St., 19.

We agree with the opinion of the court below, in deciding the demurrer, that:

"A policy of insurance issued by a so-called 'accident' company, as applicable to injuries resulting in death, is but a contract of life insurance limited to specified risks; that is, a policy on the life of a person, but insuring against death from certain specified risks. See *Kerr, Life Ins.*, 5; *State v. Investment Co.*, 48 Minn., 110 (50 N. W. Rep., 1028)."

The policies being within the purview of the statutes, the question of their applicability in the present case de-

pend upon the facts and conditions of the case itself with respect to each of the sections separately.

First. Section 3625 has reference to an untrue statement in an application for a policy which, if relied upon as a defense against payment under the policy, requires "clear proof"—

- (a) That it is willfully false.
- (b) That it is fraudulently made.
- (c) That it was material.
- (d) That it induced the company to issue the policy.
- (e) That but for such statement the policy would not have been issued.
- (f) That the agent or company had no knowledge of the falsity or fraud.

The meaning of these provisions under the rule of construction requiring us to give effect to each is reasonably clear:

- (a) A statement may be false in fact, yet not willfully so.
- (b) It may be willfully false (that is, made with knowledge of its falsity), yet not fraudulent (that is, in addition to knowledge of falsity, made with intent to deceive, and thereby gain an unlawful advantage).
- (c) It may be false, yet not material (that is, relating to unimportant particulars).
- (d) It must be of such consequence as induced the company to issue the policy; and this is emphasized in the following condition:
- (e) That, but for such answer, the policy would not have been issued.

Lastly,

- (f) The agent or company must have been ignorant of the falsity or the fraud of the answer.

The proof as to each of these facts must be clear before the defense will avail. But, to entitle a defendant to prove specific facts as a defense they must be pleaded. It will be observed that the requirements of the statute are cumulative and not alternative, and that the terms of the statute

imply the pleading as well as the proof, for the language is in the alternative, viz., that the answer objected to shall not "bar the right to recover," "or be used in evidence," unless, etc.

The answer alleges falsity, materiality, and the issue of the policy upon the faith of the representation *sine qua non*; but it does not allege willfulness, fraud, or want of knowledge of the agent or company, and therefore does not state facts sufficient under the statute to constitute a defense.

The testimony, moreover, establishes beyond a reasonable doubt that the death was caused wholly by external injuries and excludes the physical defect involved in the answer as a contributory cause; so that, if "materiality" under the statute could be held to mean the relation of the defect to the causes of death under the facts of a given case, the proof fails to show materiality in such sense. Nor does the testimony sustain a charge of fraudulent intent. Fraud is not to be presumed; and without entering upon a full analysis of the testimony here, our conclusion is that fraudulent intent is not established. There was no original application for these policies *per se*. They were sent to the defendant, filled out and executed upon the basis of facts involved in the policies of 1892, without other explanation than that the policies were more beneficial to the insured than the old. While for some purposes his acceptance without dissent makes these to all intents new affirmations, yet, upon the question of fraudulent intent, this proof alone would not be sufficient. The collateral circumstances do not show that the matter of his then physical condition was recalled to his attention or that he knew or realized that he was making a new contract as contradistinguished from a mere renewal of the old. In fact, the testimony does not affirmatively show that he, at any time, intended a willfully false statement, much less one springing from a fraudulent purpose.

The statement related to "bodily infirmity or disorder," and it is fairly conceivable that Stacey may have taken the word "infirmity" in its primary sense as relating to a condition of weakness or an unhealthy state of the body

(Century Dict.). He had a defect, but not an unsound or unhealthy condition. A man might fairly suppose that the word "infirmity," in its collocation with "disorder," meant a weakness (as of some hidden organ) tending to disorder, taking the latter word in the sense of an active malady.

For like reasons his assertion that he was in "sound condition mentally and physically" may have been, in his thought, consistent with a defective power of vision. The questions were not only very general and susceptible of a very general answer, but from their terms might well have been understood to refer only to conditions of disease related to the vital organs as to which he alone possessed knowledge, and not to bodily defects such as were visible to every one.

The defect of the eye complained of was of such a character as to be visible to every one who met him, and this suggests at least an inference that it was known to the agents of the company who originally insured him, and who collected the premiums year after year, and there seems to be no testimony to the contrary, except the bare denial of Reno alone.

While the proposition that the greater includes the less is axiomatic in its proper place, it will not serve as a rule of evidence where fraud is to be proved, and the fact in issue relates to an element only inferentially included in a general and not a specific statement. To hold otherwise would open the door to a return to those conditions which is the object of the statute to remedy; for it would deprive the requirement of the statute of all vital force.

The statutes in question fall clearly within the class specified in *Insurance Co. v. Leslie*, 47 Ohio St., 409, 413, designed to "protect the assured against unreasonable forfeiture and defenses;" and the policies in issue here were taken in full view of these provisions which hold up a warning finger to companies that if they take risks without proper examination in their own behalf, they do so at their peril within the statutory limitations. See *Dwelling-House Ins. Co. v. Webster*, 4 Circ. Dec., 704 (7 R., 511); *New*

York Life Ins. Co. v. Block, 6 Circ. Dec., 166 (12 R., 224); *Hanner v. Insurance Co.*, 49 Bull., 140, affirmed, *Aetna Life Ins. Co. v. Hanner*, 69 Ohio St., 568, no report.

We are of opinion, therefore, that under Section 3625, Revised Statutes, the action of the court below is justifiable, because both in pleading and proof the plaintiff in error failed to establish its defense.

Second. Section 3626, Revised Statutes, creates an estoppel against maintaining a defense of the character interposed in this case, if three annual premiums had been paid and received upon the policy.

The proof here shows that Stacey took out policies in 1892; that these were kept alive by renewals until 1899, when, instead of renewing in the usual manner by renewal receipts, the company, without consulting Stacey, sent the present policies for his acceptance with a statement that this was:

"For the reason that we (they) were taking up all our (their) old policies and putting out new policy contracts with our (their) policy holders, because the new ones give more benefit to the insured, and we (they) wanted to give the assured the benefit of the increase in the policies."

The plaintiff in error claims that this was an entirely new contract, acceptance of which by Stacey, abrogated the old, and that Section 3626, Revised Statutes, therefore, can not be applied to the case. The logic of this defense is that, by making the written contracts in terms annual, the statute could never apply at all, though the insurance be really renewed year by year without break. But why should we give so strained and narrow a construction to a statute obviously declaring a rule of public policy? The evil designed to be remedied was of this very character; namely, the rigid interpretation of written contracts, by rules established primarily upon agreements where parties stand upon an equal footing and presumably expressed on both sides their well-considered intentions. The business of insurance long ago outgrew such conditions, and developed special contracts, prepared in all cases by the insurer, based

upon complicated data of which the insured usually possesses little comprehension.

Taking into view the remedial purposes of the statute and the conditions under which it was obviously designed to operate, we are constrained to give the word "policy" a broader signification than that of the mere document and regard it as synonymous with "agreement," in the broad sense, of which the written document is a mere form of expression.

The argument of the plaintiff in error tends to force this conclusion by showing that on any other basis the statute is nugatory so far as these companies are concerned. The argument is that the renewals of the 1892 policy made each year a new and independent contract, just as in the case of ordinary fire policies.

"If under those conditions," it is argued, "the contract was from year to year * * * how can it be claimed that the provisions of Section 3626, Revised Statutes, are applicable, even if an entirely new policy had not been issued in 1900, or if that policy was treated as a continuation of the annual renewals?"

We can not agree with this view. These contracts, as we regard them, are like leases of uncertain duration which were long ago construed by the English courts to be leases from year to year, which, though either party had the right to terminate at will at the expiration of any year, were expected to continue indefinitely—each continuance of occupancy after termination of the year being equivalent to a new entry. Even in such cases a change in rental or other detail made by agreement did not affect the general nature of the tenancy.

If we are correct in our construction of the statute, it applied to the agreement as renewed up to 1900; and, under the circumstances of this case, we can not but regard the new policies of 1900 as, in effect and for the purposes of the statute, a renewal of the old agreement of insurance, voluntarily modified by the plaintiff in error and accepted by Stacey as to certain details, but essentially the same in gen-

eral character. The insurance was in fact continuous from 1892 until Stacey's death.

It follows from these views that the new policy was in fact a renewal of his insurance contract, and as more than three annual payments had been made thereon, the case falls also within the purview of Section 3626, Revised Statutes, whereby the plaintiff in error was estopped from making defense upon the statements in question.

Further questions suggested in argument we do not find it necessary to consider in view of the foregoing. We find no error in the action of the court below, and the judgment is therefore affirmed.

Judgment affirmed.

Robertson & Buchwalter, for plaintiff in error.

Sayler & Sayler and *Charles H. Fiske*, for defendant in error.

JOHN L. PUCCINI v. CITY OF CINCINNATI.

1. Contributory negligence of plaintiff is fatal to recovery; and where the proof required to establish plaintiff's injury includes clear proof of all the material facts relating to his conduct and duty, and these admit of no reasonable inference but that of negligence on his part, the case presents only a question of law for the decision of the court.
2. The question of contributory negligence is usually one of law and fact, and it is only in exceptional cases where the facts are so clear and undisputed that the question of law alone remains, that the court is justified in overriding the functions of the jury.
3. It is not negligence *per se* for one to go upon a public way which he knows to be out of repair; but whether or not such conduct constitutes negligence depends upon whether the going upon the way can be "easily" avoided. Hence, where the only alternative for plaintiff in order to reach his desired destination, was to go around three sides of the public square, and over streets only partially improved, it can not be said as matter of law that he was negligent in taking the course he did, if he exercised greater care than he otherwise would have exercised had the defect been unknown to him.

4. Where the evidence shows that a public way was out of repair to the knowledge of the plaintiff, but that, nevertheless, he went upon it in order to reach his desired destination, his only alternative being to go around three sides of the public square, and over unimproved streets, and the evidence further shows that the way was light at the time plaintiff went upon it, but that the lights went out when he was only about half way over, in such case, the question whether or not plaintiff was negligent in going upon the way, and in going forward not backward after the lights went out, is for the jury.

HOSEA, J.; HOFFHEIMER and CALDWELL, JJ., concur.

Error to special term.

The suit below was for damages for injuries received while passing over a public way—being a flight of wooden steps leading from State avenue to Kineon avenue—which, through negligence of the city, had become defective and dangerous. In presenting his testimony, plaintiff admitted that the dangerous and defective character of the steps was known to him at and prior to the time of the injury. Coupled with this admission, however, was evidence of care and of the further fact that the steps afforded the only access to plaintiff's residence from below excepting over partially improved streets three squares around (approximately 1,200 feet). There was also testimony showing that the steps were ordinarily lighted at night by an electric light above; that when the plaintiff had gotten half way up the steps on the night in question the light went out, and he was compelled to proceed in darkness; also that he was proceeding carefully, realizing the danger, and had his hand on the banister as a guide when he fell and was injured.

On the conclusion of the testimony for plaintiff the court, on motion, instructed a verdict for defendant, which action is assigned as error.

Starting with the familiar rule that contributory negligence is fatal to recovery. (with certain exceptions not applicable here), the further rule has been adduced, namely, that where the proof required to establish plaintiff's injury includes clear proof of all the material facts relating to his

conduct and duty, and those admit of no reasonable inference but that of negligence on his part, then the case presents matter of law for the decision of the court only. *Cleveland, C. & C. Ry. v. Crawford*, 24 Ohio St., 631, 634. But in the above case the court also establish the correlative rule as follows, page 638:

"The law in cases of mutual negligence is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover (*Timmons v. Railway*, 6 Ohio St., 105). It is no case of mutual contribution to an injury, where the injured party could not, by the exercise of due care, have avoided the consequences of another's carelessness."

The court follows this a little later with the rule of legal presumption above given, and states the antithesis of such rule as follows, page 640:

"But, on the other hand, if the testimony is conflicting, the facts uncertain, or the proper inferences to be drawn from the facts and circumstances doubtful, then it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict."

In the case of *Schaeffer v. Sandusky*, 33 Ohio St., 246, the rule is applied in a case of a sidewalk rendered dangerous by ice. The facts were submitted to a jury and the court entered judgment on the special as opposed to a general verdict. The facts found were, (1) that the plaintiff knew the nature and character of the obstruction; (2) voluntarily passed over it; and (3) could have avoided it. The court here stated the law to be that, upon these facts shown, the injured party could not be regarded as exercising ordinary prudence, and, consequently, could not recover because of contributory negligence. To reach this conclusion the court infer from the special findings that plaintiff could "easily" (*sic*) have avoided the obstruction, and held that "under such circumstances it was his duty to avoid the danger."

In *Conneaut (Vil.) v. Naef*, 54 Ohio St., 529, in stating the point decided in *Schaeffer v. Sandusky*, *supra*, the court say, that the precise question left undetermined is, in substance, whether the rule applies where the source of danger is plainly visible as well as where it is actually known; and held that it does so apply.

The more recent utterance of the Supreme Court, in *Balt. & O. Ry. v. McClellan*, 69 Ohio St., 142, is the logical corollary of the cases cited, namely, that where the plaintiff's testimony raises a clear presumption of contributory negligence, and he offers no proof tending to rebut, it is the duty of the court to direct a verdict.

It will be obvious upon the state of the law, as shown in these cases, that the question of contributory negligence is usually one of law and fact, and that it is only in exceptional cases where the facts are so clear and undisputed that the question of law alone remains and the court is justified in overriding the functions of the jury, as indicated in *Balt. & O. Ry. v. McClellan*, *supra*.

In the case at bar there seems to us to be at least one important question of fact to be determined upon the testimony and which is essential under the established rule, namely, the question whether the danger was one which could have been "easily" avoided. The court below seems to have assumed that to go upon a public highway known to be out of repair and dangerous is negligence *per se*, but under the rule of *Schaeffer v. Sandusky*, *supra*, this depends upon whether it can be "easily" avoided. The testimony in this case shows that the only alternative was to go around three sides of the square, over streets only partially improved. If the defective passageway could not be easily avoided, then the plaintiff was justified in going over it; and, being apprised of the danger, as is admitted, "he must exercise greater care in passing over them"—the defects—"or by them, than if they did not exist." 1 *Shearman & Redfield, Negligence*, Section 375.

The proper rule applicable to the case in hand, we think, is that stated in *Beach, Contr. Neg.*, Section 274, as follows:

"When a highway is out of order it is held, as a general

rule, not negligent to use it in as prudent a way as practicable, which is to say that it is not negligence as a matter of law. * * * But when the condition of the highway is such that it is obviously dangerous to go upon it, and it appears that the plaintiff might easily have taken another course and avoided the danger, there can be no recovery in case of injury. To go upon a highway under such circumstances is negligence sufficient to bar an action for damages. Mere knowledge, however, of defect or danger in the highway, on the part of the person injured thereby, is not conclusive evidence of negligence contributing to the injury. As, for instance, where one has proceeded so far in a narrow pass before being warned of danger ahead that he is unable to turn back."

In the present case there was evidence that the steps were illuminated when plaintiff approached them, and the jury could have found that, in view of the long way around as the only alternative, plaintiff was not negligent in entering upon them. If they were further satisfied—from the testimony to that effect—that the light went out when he was half way up, they might justly have concluded that it was a case of Hobson's choice whether to go forward or backward, and that under the circumstances of the case his conduct in going forward was not negligent. These were matters of fact for the determination of the jury, and we think it was error to deprive them of their function in this regard; consequently, the action of the court below must be reversed and a new trial awarded, and it is so ordered.

Judgment reversed and new trial awarded.

W. C. McLean, for plaintiff.

C. J. Hunt, City Solicitor, for defendant.

WILLIAM M. AMPT *v.* CITY OF CINCINNATI ET AL.*

1. An action commenced by a tax-payer as such, under favor of 1536-668, Revised Statutes, to enjoin the operation of an alleged illegal contract entered into between the municipality and a railroad company, will be dismissed at plaintiff's costs, when it appears from the evidence that the action is not brought in good faith for the purpose of protecting the municipality, but in the interest and at the instance of a rival and competing railroad company. The privilege conferred upon tax-payers by said statute is conferred strictly in a public capacity and for the public benefit, and not to further private schemes or interests.
2. Before a tax-payer can maintain an action under favor of Revised Statutes, 1778, to enjoin the operation of an illegal contract entered into by the municipality, the corporation counsel is entitled to a reasonable length of time after request of the tax-payer to bring the action in which to make a necessary examination into the matter brought to his attention, and a mere refusal on his part to bring suit "to-day or to-morrow," or until he had "sufficient time to determine whether or not such should be brought," is not such a failure to act as will warrant a tax-payer in commencing suit forthwith, in the absence of an exigency inherent in the subject-matter of the suit requiring immediate action. *A fortiori* when the only exigency existing, if any, was by reason of the neglect of plaintiff himself in delaying his request.
3. The petition of a tax-payer in a suit commenced under favor of Revised Statutes, 1778, which makes no claim that the tax-payer or the public are in any manner injured by the alleged illegal contract sought to be enjoined, either by increase in taxation, or otherwise, or that such contract is not beneficial to such interests, is defective, in that the ordinary grounds of injury of a tangible nature, the prevention of which is the predicate of injunction proceedings, are wholly wanting.
4. Implied power, *ex necessitate*, is conferred upon the commissioners of the Cincinnati waterworks by (Revised Statutes, 2435-1 to 2435-18), in the absence of express limitations contained therein, to contract with reference to the property and undertaking under its control, without securing the consent or concurrent action of the board of legislation or other officer or board of the municipality.

* Affirmed by Supreme Court, 74 O. St. —.

5. **Transportation facilities, such as can alone be afforded by a railroad company operating as a general common carrier, are distinctly within the general scope of the undertaking entrusted to the commissioners of the Cincinnati waterworks, and are contemplated by the act under which the work is being carried out; and contracts securing such facilities are, therefore, within the discretionary power of the trustees. Hence, said commissioners may, in the exercise of their power, grant to a railroad company a permissive right, for a term of years, to the surplus use" of a railroad over the property of their trust, it appearing that such arrangement is necessary and germane to the waterworks system, and also highly beneficial both to the commissioners in carrying out their work, and to the general public.**
6. A lease by the Cincinnati waterworks commissioners of surplus use of property to a railroad company for a term of years, and assisting in laying a track over such property, the trustees reserving the ownership and control of the property to the public, does not involve the municipality in a joint enterprise or partnership relation with the company, especially when the arrangement between the commissioners and railroad was necessary in order to enable the former to carry out their trust.
7. In the exercise of purely governmental functions the municipal authorities charged therewith are bound to transmit the power entrusted to them to their successors unimpaired; but in the exercise of proprietary functions, such rule does not apply, because they act and contract for the private benefit of the municipality and its inhabitants, and they may, therefore, exercise their business judgment as private trustees. Hence, the commissioners of the Cincinnati waterworks, being charged with the exercise of proprietary functions of a *quasi-private* nature in carrying out the work entrusted to their charge, are therefore trustees in fact, and as such are governed by many of the considerations applicable to individuals who are under the responsibilities and duties of trust management; and it appearing that the leasing of surplus property to a railroad company is for a purpose germane to the objects of their undertaking, and not an abuse of the power conferred upon them, such transaction will be upheld, notwithstanding it is for a period extending beyond that required for completing the undertaking of the commissioners.
8. Where the power to contract in the independent relation of trustees exists, the only question that can be raised concerning a given contract is whether it is an abuse of the powers of the trustees, as shown by its terms and scope and the surrounding circumstances. The time of the contract is simply an element, like any other, to be considered in this connection,

and the fact that the rights granted extend beyond the tenure of the trusteeship is immaterial, unless the contract is of such nature that the term thereof points to an abuse of power.

W. M. Ampt, E. G. Kinkead and C. B. Ellis, for plaintiff.

The board had no power to alienate any of the land to the railway company for common carrier purposes. Especially not for the period of the grant after the completion of the work. R. S., 1678, 2407, 2435-6, 2435-13; Sections 1655, 1655*b*, 2212, 2408, Revised Statutes; *State v. Railway*, 37 Ohio St., 157, 158, 169, 176.

The board is a building commission merely. Its members are not public officers, but trustees, as the act describes them. *Walker v. Cincinnati*, 21 Ohio St., 14; 2435-1, 2435-6, 2435-12, 2435-14; *State v. Railway*, 37 Ohio St., 157.

The franchise in question involves a joint use and commingling of public property and funds with private property and violates Section 6, Article VIII, of the Constitution. *Garland v. Montgomery Co. (Bd. of Rev.)*, 87 Ala., 223 (6 So. Rep., 402); *Alter v. Cincinnati*, 56 Ohio St., 47; *Wyscaver v. Atkinson*, 37 Ohio St., 80; *Walker v. Cincinnati*, 21 Ohio St., 14, 54.

The refusal of the corporation counsel to bring the suit before the going into effect of the new code, justifies the tax-payer to treat his refusal as final. Section 137 of the Municipal Code; R. S., 1774, 1777, 1778.

The competing railroad company being a tax-payer had the right to bring a suit itself under 1536-668, R. S., and so had the right to co-operate with, and aid the tax-payer who did bring this suit.

If a tax-payer in fact makes out a case under 1536-667, R. S., 1777, his motive in bringing the suit can not be made an issue. *Raynolds v. Cleveland*, 24 O. C. C., 215; *Hamilton, G. & C. Trac. Co. v. Parish*, 67 Ohio St., 181; *State v. Columbus (Bd. of Ed.)*, 35 Ohio St., 368, 382, 383.

HOSEA, J.

1. Suit is brought by the plaintiff, in his capacity of tax-payer under the statute (Section 1778) in that behalf, to restrain operation of a contract entered into by and between the "Board of Trustees, Commissioners of Water Works," in behalf of the city of Cincinnati, on the one part, and the Cincinnati, Georgetown & Portsmouth Railroad Company, on the other, on December 10, 1901.

For the sake of brevity, a detailed recital of the pleadings, and the documentary and other evidence submitted in the cause, and the many points made in the very able arguments of counsel, being unnecessary, only such references thereto will be made as may serve to indicate the grounds of the views herein expressed.

The contention of the plaintiff is, in brief, that the contract in question which grants the Cincinnati, Georgetown & Portsmouth Railroad Company a permissive right for a term of years to operate their railway over and through the water works property near California, Ohio, is void as being beyond the power of the board of water works commissioners to make. But among the defenses pleaded is one that lies at the threshold of the inquiry, being in the nature of a plea in abatement, namely, that the action is not brought, as it purports, in the interest of the city of Cincinnati, or its tax-payers, but in the real behalf and interest of a rival and competing railroad company also operating a line of railway over and through the property under control of said water works commission, to a common competing point at Coney Island lying beyond, for the purpose of defeating and embarrassing the Cincinnati, Georgetown & Portsmouth Railroad Company in respect of its rights acquired under said contract.

This defense raises a legal question as to the right of a tax-payer to use the privilege given him by the statute in behalf of the public for other and private interests.

The question has a double aspect, arising, first, under the code provision requiring that suits shall be brought in the name of the real party in interest, and, second, under the

well-known rule that equity will not permit its jurisdiction to be used as a mere cover for a collateral attack.

In this case the evidence shows (and the plaintiff admits), that he appeared before the water works commissioners as the paid attorney and in the interest of the then Cincinnati & Eastern Railway Company, in December, 1901, to oppose the making of the contract in question, for which service he was paid \$100 by said company.

It is next shown that on July 1, 1902, a petition in quo warranto was filed in the State Supreme Court against the Cincinnati, Georgetown & Portsmouth Railroad Company—said petition being signed by the attorney-general and by the general counsel for the then Cincinnati & Eastern Railway Company—setting forth the above mentioned contract of December 10, 1901 (the same as here in question), and claiming ouster, because of the invalidity of said contract, upon substantially the same grounds as are urged in the suit at bar; and that upon the hearing of said cause in the Supreme Court the argument was made, and brief prepared and submitted, by said attorney of the Cincinnati & Eastern Railway Company and an associate, as principal counsel.

It next appears that in another similar proceeding in the Supreme Court, filed on July 25, 1902, against the Cincinnati & Eastern Railway Company, said company was defended by its same attorney.

In the first of these cases, counsel for the competing companies appeared for their respective clients, urging substantially the same claims and defenses as are urged here, namely: the want of power in the water works commission to grant such rights; but the Supreme Court held that quo warranto was not the proper proceeding in which to raise the question of validity of the contracts in question. These facts are chiefly material as showing a status of active controversy between the two companies in relation to the subject-matter of the present suit.

This suit was filed May 1, 1903; and the plaintiff testifies that, some weeks before that time, his attention was called to the matters involved in it, by the counsel for the

Cincinnati & Eastern Railway Company who showed him the judgment and papers in the Supreme Court proceedings, and wanted him to look into the matter with a view to his bringing the present suit, as they wanted him to test the question. Later, something was said about compensation, and, after filing the suit, he was paid by the Cincinnati & Eastern Railway Company \$100 and they agreed to pay him \$100 more when the suit should be determined in this court. These payments and agreements are further established by the testimony of the president of the company. Plaintiff further testifies as follows:

"They (meaning the Cincinnati & Eastern Railway Company) and your road (meaning the Cincinnati, Georgetown & Portsmouth Railroad Company) are rival railroads. They are interested in cutting you off from getting to Coney Island."

Plaintiff also admits that in bringing this suit ostensibly for other tax-payers, he had in mind only the attorneys of the Cincinnati & Eastern Railway Company.

The state of facts thus disclosed brings the question of plaintiff's right to prosecute this suit sharply into consideration in a forum where equity and good conscience on the part of litigants are the mainsprings of its action.

Before a statute of this nature was enacted, a tax-payer had no right to invoke a remedy of this nature, except where his own property rights were put in jeopardy by the act in question, against a municipality. Beach, *Injunction*, Par. 13. The power to do so was placed in his hands as a privilege to be exercised in a public capacity and for the public benefit.

The language of our statute, R. S., 1778. is: "It shall be lawful for such tax-payer to institute such suit for such purpose in his own name on behalf of the corporation," etc., and if the court is satisfied that the case is well founded in law, or that the tax-payer had good cause to believe so, he is allowed costs and reasonable counsel fees; thus indicating clearly to my mind a recognition of the fact that this privilege is conferred upon a tax-payer strictly

in a public capacity, for that, in a proper case, he is to be compensated therefor, either by the public funds or as part of the costs of the suit to be assessed against the defendants.

It certainly should not be contended that, in considering such a case from the standpoint of equity and justice, a court of equity should ignore the time-honored and settled principles that constitute the warp and woof of its jurisdiction and shut its eyes to the obvious evils that would flow from permitting, in a case where the fact is plainly proven and openly admitted, a party to farm out, for a money consideration, to private interests and for private benefit solely, the high privilege conferred by the statute.

Yet it is so contended in this case; and it is claimed that the Supreme Court has so decided. But the case referred to in argument, *Hamilton, G. & C. Trac. Co. v. Parish*, 67 Ohio St., 181, 194, does nothing of the sort, but merely reiterates a familiar doctrine, namely, that in prosecuting a *private right* cognizable in a court of competent jurisdiction, the motives of a party are immaterial.

The true principle involved here is well set forth by the Court of Appeals of South Carolina, in an early case, as follows, and I quote from the opinion in that case:

"The redress of private wrongs, and the suppression and punishment of crimes and misdemeanors, as a means of promoting the happiness of mankind, are the leading objects of the government and laws of every well-regulated society. The pursuit of right, whether public or private, can never be an offense where justice alone is the end in view; but every perversion of the machinery of law to other purposes by coupling it with improper objects is reprehensible * * *. He who brings a public offender to justice does well; but he who uses a public prosecution as a means of gratifying a passion for mischief, or for the sake of filthy lucre, is an offender of no ordinary magnitude." *State v. Chitty*, 1 Bailey (S. C.), 379, 400, 401.

These general views have been recognized and applied in cases like that at bar in this and other jurisdictions.

Thus, in *Gallagher v. Johnson*, 1 Dec., 264 (31 Bull., 24),

in the court of common pleas of this county, a tax-payer's suit based upon the statute in question was dismissed upon the ground that it appeared at the trial to have been brought at the request of a person or corporation whose interests were inimical to the municipal corporation, and that the tax-payer had been indemnified by him or it for the fees and charges of the suit. The very able opinion of Judge Wilson treats the subject at length, citing: *Hensly v. Hamilton (City)*, 2 Circ. Dec., 114 (3 R., 201); *Knorr v. Miller*, 3 Circ. Dec., 297 (5 R., 609); *Simmons v. Toledo*, 3 Circ. Dec., 64 (5 R., 124); *Sloane v. Railway*, 3 Circ. Dec., 674 (7 R., 84); and distinguishing *Brockman v. Creston (City)*, 79 Iowa, 587, 588 (44 N. W. Rep., 822); and *Mazet v. Pittsburg*, 137 Pa. St., 548 (20 Atl. Rep., 693). Judge Wilson's conclusion is thus stated, page 265:

"Now, certainly, if the right to bring this action is a privilege conferred upon the plaintiffs for the purpose of protecting the corporation, if the plaintiffs have commenced the action, not for the purpose of protecting the corporation, but for the purpose of advancing the rights of private individuals under the guise of protecting the corporation, it is an abuse of the privileges conferred by the statute, and the plaintiffs are not entitled to any standing in this court."

In *Mazet v. Pittsburg*, *supra*, the plaintiff was shown to be a property holder on the line of the paving improvement and directly affected by it. The court in that case said, page 564:

"If it appeared that the plaintiff was a mere volunteer, without direct personal interest in the controversy, or that he had bought his way into it since the acts complained of occurred, his position would be different, * * * but he avers, and they admit, that he * * * is a property owner on the street, and as such liable to be assessed for the paving, * * * in short, that he has a direct and substantial pecuniary interest in the controversy. * * *

"We also agree with the court below that the question

of plaintiff's standing in court should have been raised by a plea in the nature of a plea in abatement; but * * * there is nothing in the facts of this case to sustain it."

The decision of Judge Wilson is sustained and approved by the circuit court in *Brown v. Toledo* 10 O. C. C., 642 (I quote from page 116), as:

"A case arising in Cincinnati, in which there was a very full and very fair discussion of the question, and which it seems to us is a very correct statement of the law;" and the court further say, "and we are pretty strongly of the opinion that if that fact had appeared on the trial here, that that action [dismissal] would have been had in this court."

Judge Pugh, of the Franklin Common Pleas, in *Fergus v. Columbus (City)*, 8 Dec., 290 (6 N. P., 82), in dismissing a tax-payer's suit upon other grounds, cites with approval the same principle, saying, page 292:

"When the bone of contention is touching a contract awarded by the municipal corporation to one of several competitors, a suit prosecuted nominally by a tax-payer, but in reality to help a disappointed competitor for the contract, would be a gross abuse of the rights conferred by the statute, and courts will refuse to exercise the jurisdiction when that fact is shown."

In *Hull v. Ely*, 2 Abb., N. C., 440, the New York Supreme Court, by Van Brunt, J., dismissed a tax-payer's suit brought upon a similar statute of New York. He says:

"It is claimed on the part of the plaintiff that he, being a tax-payer, the act gives him the absolute right to maintain the action. The provision of the act is, that actions must be prosecuted by a tax-payer to prevent waste or injury to the property of the corporation; hence it is apparent from the language of the statute that if such is not the object of the action * * * no power is conferred upon the court to entertain the suit. The evident intent of the act was to give a tax-payer a standing in court for the protection of the interests of tax-payers * * * but not for the further-

ance of the schemes of parties who have no right * * * to claim the protection of the court.

"It is apparent from the circumstances of this case, that the plaintiff has not commenced this action to protect his interests as a tax-payer, but the real parties in interest are the persons now using the ferry franchises and consequently he has no right to call upon the court for this exercise of its equitable powers."

In this same connection may be considered a further objection made by the defendants touching the right of the plaintiff to maintain this suit, namely: That the corporation counsel did not fail to bring the action when requested by plaintiff, as contemplated by the statute.

The facts in this regard are, that on April 27, the plaintiff mailed his letter requesting that suit be brought to restrain the city from permitting the Cincinnati, Georgetown & Portsmouth Railroad Company to operate its railroad through the water works property, "except as may be necessary for the proper and lawful conduct and operation of said water works during its construction, and thereafter."

The corporation counsel responded next day that he desired to examine records of the Supreme Court in certain cases pending, in which the question was involved; and on May 1, in response to requests by telephone for an immediate answer, writes that the records had been received, on April 30, and that owing to his preoccupation in duties involved in the pending changes to be made in city affairs by the new code about to go into effect, he had not sufficient time to make the necessary examination, and declined to bring suit "to-day or to-morrow," or until he had "sufficient time to determine whether or not such suit should be brought." Plaintiff thereupon filed his suit on that same day, May 1.

Plaintiff in argument seeks to justify his action by the fact that the new code, adopted by the General Assembly in 1902, and which was to take effect on May 4, 1903, contained a provision barring suits of this nature after one year from date of the contract. He claims that in conse-

quence an exigency existed which made the delay of the corporation counsel constructively a failure to act, because not to so act was, in effect, to deprive him of his right.

The argument admits that there was no failure in fact. It is not claimed that the delay for purposes of investigation was unreasonable, and certainly the importance of the question in view of the pendency of proceedings in the Supreme Court, would negative such claim if made, especially at a time when the impending change in municipal government threw upon the corporation counsel an unusual burden of pressing duties.

The time for taking effect of the new code had been known to plaintiff, as to all others interested, for a long time; and he admits that he had the matter of this suit under consideration some months before it was filed. There was no exigency inhering in the subject-matter of the suit. The status complained of had existed ever since he himself opposed the contract in 1901. The only exigency that existed—if so it may be called—was by reason of the neglect of the plaintiff himself in delaying his request. His argument in justification, therefore, lacks both propriety and cogency, for his experience as a lawyer surely must have taught him that a reasonable time must be allowed a public officer, under such circumstances, to examine into the probable merits of such a suit; and that the “failure” contemplated by the statute, can be predicted only upon a refusal to act or an actual failure to do so beyond a reasonable time required for investigation, neither of which contingencies is shown in this case.

In a court of equity, diligence in asserting a right is always commended, and one who is shown to have slept upon his rights is often remitted to continued somnolence—out of court.

2. The cause has been fully argued on its merits; and as it is of much public importance, and a dismissal of the action upon grounds that do not involve decision upon the merits, might result in prolonged delays in litigation before reaching a final determination, the entire contention will be disposed of, so far as it may be done in this court, by

consideration of the merits of the cause, notwithstanding the objections hereinbefore discussed.

The plaintiff, in his final brief, summarizes his contention in these words:

"Of course the city's interests are to be considered. That is what this suit is for,—to determine whether any of its property can be turned over to the absolute control of a money-making corporation for thirty-five years to do a commercial and general railroad business, Such purpose is not germane to a water works system."

The petition alleges in substance: (1) That the Cincinnati, Georgetown & Portsmouth Railroad Company is operating a line of railway from Carrel street, Cincinnati, through the water works property to a point beyond, doing a common carrier business; and that said line was constructed through said water works grounds at the joint expense of the water works commissioners and the railroad company. (2) That the construction of said railway and its operation as a common carrier are by authority of said commissioners, but without authority of the board of legislation of the city, although said board of legislation is fully advised of the facts, and has taken no steps to prevent the diversion of the grounds and the operation of said railway. (3) That the railway company, unless enjoined, will continue so to operate for thirty years. Wherefore the court is asked to adjudge the said operation to be in contravention of the law and an abuse of the corporate powers of the city; and to enjoin the same and direct the removal of said track, "except as far as may be necessary for the necessary and lawful conduct and operation of the road through the said water works during construction, and thereafter."

It will be noted that there is here no claim that the taxpayer or the public are in any manner injured, either by increase of taxation or otherwise; nor that the permission or authority given the railroad company is in any way injurious to the interests of the city or the public, nor, indeed, that it is not beneficial to those interests. The

ordinary grounds of injury of a tangible nature, the prevention of which is the predicate of injunction proceedings, are wholly wanting. This action is based upon the bare statutory right without aid from extrinsic facts.

And it will be further noted that the sole ground of illegality claimed, excepting an allegation that the trackway over the waterworks property was constructed at joint private and public expense, is, that the board of legislation of the city has not given its consent to the authority derived by the company from the commissioners.

The so-called "commissioners of water works," styled also "trustees," in the act, were appointed by the governor of Ohio under the provisions of and with powers enumerated in R. S. 2435-1 to 2435-18, for the general purpose of providing a new and enlarged plant and system for the water supply of Cincinnati. To defray the costs and expenses of the work, they were authorized to borrow \$6,500,000 and subsequently (95 O. L., 821) \$2,000,000 additional on behalf of the city, and issue bonds therefor signed by the president of said commissioners of water works and the city auditor.

The manifest purpose of the act, as evidenced by its terms, is to vest in said commissioners power to carry out a vast undertaking. They were to adopt plans and specifications providing for construction within or without the city limits, including a long list of enumerated things, and in addition "such other fixtures, appliances or facilities, as in their opinion are necessary." They are given full power to contract, and are relieved from the operation of special limiting statutes governing the city authorities in its contracting power. The full power of eminent domain of the city is vested in the commissioners relieved of the necessity of concurrent action of any other officer or board; and they are authorized to acquire, by purchase or condemnation, any real and personal property and franchises necessary for the work. The only expressed limitation relates to the mode of making certain contracts, taking vouchers for money payments, etc. It is also provided that upon final comple-

tion of the work, it shall be surrendered to the city board having charge of the water supply.

In considering the character of the powers granted under this act, I can but repeat here what I said in *Cincinnati v. Railway*, 14 Dec., 466, in the general term opinion (subsequently approved by the Supreme Court in 70 O. St. 476) :

"As to the power of the trustees to be exercised under the act in question [referring to an act giving certain authority to the Southern railway trustees], we can entertain no doubt. Considering the important character of the trust, it is not to be supposed that it was ever intended by the Legislature to minimize and confine the powers of the trustees in the premises, but rather to amplify them to the full measure of the necessity; and, certainly, if it depended upon questions of mere statutory construction, we should feel constrained to apply the most liberal rules recognized by the practice of courts in such cases."

Nor is it to be supposed that in dealing with such a subject as that in question, the legislators were unaware that they were creating proprietary powers of a *quasi-private* nature for the private advantage of the inhabitants of the city of Cincinnati as a legal personality, and not powers of that other class relating more directly to purely governmental functions. In respect of the former powers, authorities charged with their exercise are trustees in fact, and governed by many of the considerations applicable to individuals under the responsibilities and duties of trust management. *Cincinnati v. Cameron*, 33 Ohio St., 336.

The distinction is a vital one in this case; and a consideration of the magnitude and complex character of the undertaking and a study of the text of the act creating the commission, which enumerates rather than defines the powers granted, suggests the familiar doctrine of "implied powers," as applicable, *ex necessitate*, and as fairly within the scope and intent of the act.

We pass now to a consideration of the contract in question in the light of the facts.

The water works commission, controlled by physical conditions of the territory in and contiguous to Cincinnati,

acquired a tract of land several miles above the city, fronting on the Ohio river, and extending thence back to and upon the hills that bound the river valley, thereby—it may be remarked in passing—controlling the Ohio side of the great natural highway of the valley of the Ohio, lying between the hills and the river, and connecting Cincinnati with the up-river cities and towns.

Obviously, one of the first problems of the situation that confronted the commissioners was that of transportation. The first and most vital of the “appliances” and “facilities” required at the outset of the work was a railway connection with the trunk lines entering Cincinnati, whereby car loads of heavy machinery and other structures, cast-iron pipes of large size, material and appliances of every description, required in the work by the commissioners or contractors, could be brought from mine, factory or quarry, situated anywhere in the United States, and delivered upon the grounds without breaking bulk. Without such facilities, and forced to depend upon the river or the only other then existing highway, a turnpike road, it would have been impossible to carry out the intended work within any practicable limit of cost.

The Cincinnati, Georgetown & Portsmouth Railroad, a narrow-gauge railway of limited capacity, was the only railway available. It connected with the Pennsylvania system, and through it with other leading railways of the country, at Carrel street about three miles away, and touched the water works property at the northwest corner. The commissioners very properly, and in order—to borrow the phrase of the Supreme Court—“to get everything ready to proceed to the construction,” built a suitable railway track upon their property (so that the whole ownership and control thereof might be in the public as our law requires), and extended it by a necessary viaduct to the boundary line of the property at a point nearest the Cincinnati, Georgetown & Portsmouth railway. This was done upon the understanding embodied in the contract of August 5, 1898, under which the railway company proceeded to rebuild its track and appurtenances from a connection with

said water works viaduct to Carrel street, in order to bring in standard-gauge cars from other railways.

Unquestionably this arrangement was a most desirable one to the city, for not only was the contract in its terms in every respect favorable for the city, but in collateral aspects was beneficial in a far-reaching degree as an important factor in every contract for supplies of all kinds. Indeed, it was vital to the successful accomplishment of the entire work, and it must remain an important factor in the future maintenance of the system.

But a mere spur-extension into the water works grounds was soon found to answer but partially the requirements of the situation. Officers, employes, contractors, workmen and the general public interested in the work, required more frequent and regular communication with the city than the railway company was justified in providing, upon the basis of the water works business alone.

The railway company, therefore, extended its line south-eastwardly from the water works property to California and Coney Island, and the commissioners, by a contract dated December 10, 1901, leased to them, non-exclusively, for a term of years, the surplus use of the trackway through its property for general railroad purposes, and authorized them to plant poles and string wires for electrical propulsion, thereby enabling the company to run cars at frequent intervals and avoid the smoke and cinders that might be detrimental to the water supply.

Of this contract, which is the one in dispute in this case, it may be said (as also of the first contract), that so far from being in any way detrimental to the city's interests, it is in all respects highly beneficial. It will suffice here, without setting forth the contracts in full, to point out the salient features in connection with the objections urged.

Under the first contract the commissioners were to build a railway of standard and narrow gauge from their boundary line nearest the Cincinnati, Georgetown & Portsmouth railroad across the water works lands near the village of California (lying just beyond), and to keep in repair all embankments, bridges, trestles and piers of the railway so

constructed. The Cincinnati, Georgetown & Portsmouth Railroad Company were to reconstruct their railway from Carrel street station to connect with the railway thus built by the commissioners, and were to operate said railway from Carrel street to and upon the water works lands and switch cars from Carrel street under specified and very favorable rates, or a proportionate part of any through rate made direct to the water works terminus, and to pay on each car loaded in full or in part thus hauled, a certain price during the construction of the water works.

The second contract recites the first one, and contains a declaration of the commissioners that the rights thereby provided for and as revised and modified by the second contract, are necessary for the construction and future maintenance of the works; grants permission and authority to the Cincinnati, Georgetown & Portsmouth Railroad Company to operate with the necessary equipment, the railway built by the commissioners over the water works property, to the village of California, and to construct certain portions of the track upon the water works lands which the commissioners had failed to construct as agreed, and maintain a passenger station on the grounds. It is provided that all track thus constructed on the grounds shall belong to the

company. After completion of the water works, electricity only is to be used as a motive power in the operation of the railway.

Then follow minor provisions relating to the protection of the city's interests in various particulars, as conditions precedent to the continued operation of the railroad; and reservation of a right to permit the joint use of the tracks by any other railway. It limits the term of the grant or lease to thirty years; and provides for a car license during the construction of the water works and a flat rental of \$500 per year thereafter in lieu of car licenses, with a reservation also of a right to terminate the lease at any time for failure of the railway company to comply with any of the conditions of the lease. There is also a restriction upon transfer of rights; an extension of switching rates as provided in the first contract, during the contin-

uance of the lease and requires a bond of \$15,000 for faithful performance by the company.

By this second contract in addition to the mere delivery of freight cars upon the water works property, there was established a direct, speedy and frequent communication with the city—for the Cincinnati, Georgetown & Portsmouth railway also connects at Carrel street with the street car lines—by which the officers, workmen and the general public could reach the works at will and at small expense. In addition to this, baggage, express matter and mails are promptly interchanged with equal facility. To say that these things are not germane to a water works system, is to ignore the vital conditions incident to every large enterprise carried on by human labor.

The advantages accruing to the city, in respect to the multitude of persons necessarily employed in the work, in cheapening and rendering possible the securing of labor, were second only to those relating to the transportation of heavy freights from a distance; and the objections grounded on the want of connection between water works purposes and the operation of the railroad as a common carrier fall of their own weight.

But it is said further that the lease contract is "*ultra vires*," and "invalid," because in the construction of the railway through the water works property there was a joint enterprise and an unlawful mingling of public and private funds; and further, in support of this contention, that it is "no part of a municipal function to provide railroad facilities," or "to turn over city property to the sole control of a railroad company and furnish a right of way over city grounds, and still less, to expend public funds thereon."

But this objection rests upon loose thinking, and a failure to observe the clear distinction hereinbefore pointed out between purely municipal or governmental and proprietary functions. It is quite clear from the terms of the contract in question that the ownership and control of the city property is carefully reserved to the public. What has been done was, and is, simply a leasing of the "surplus use," which does not in any way involve the city in a joint enter-

prise or in partnership relations of any kind whatever. It is also quite clear that the building of the railway over the grounds by the commissioners was necessary for reasons already pointed out.

The objection is based upon a manifest misstatement of the facts to support a misconception of the law, for it is obvious upon the actual facts that if the law were as embodied in the objection, every leasing of municipal property the use of which is not needed, would be equally a violation of the law. The distinction is very clearly pointed out in the case of this plaintiff against the city, based upon the water works law in question, and cited here in support of his contention. *Alter v. Cincinnati*, 56 Ohio St., 47, 64.

I may say, however, at this point, that the other counter-objection, namely, that arising upon the clause of the contract providing that when the track shall be taken up the material therefor shall belong to the company, is based upon a misconception of the contract. While the contract in that respect is possibly a little obscure, yet, inasmuch as the second contract is a mere revision and modification of the first, taking the two together it is clearly meant that the trackage built over this property and to be maintained by the railroad company, belongs to the city; that the material, which, in the event of tracks being taken up, shall belong to the company, can have reference only to material of an incidental nature.

I think that a fair construction of the clause in question, taken in connection with the similar clause in the first contract. Just what that material is, is the point of obscurity, but it is explainable upon the theory that the commissioners, with a view to the performance of their part of the first contract, may have collected some material which they intended to be used in the construction of their own track, as they had agreed to do; that is, material other than track proper, such as cross-ties, material for ballast, or what not, which was simply material which the track incidentally afforded, and which was of no particular value in itself.

But even if it were not so, under this contract the only occasion for taking up the rails would be after the conclu-

sion of the contract, and certainly, any material, whether trackage or anything else, which had to be maintained and consequently would have to be renewed by the railroad company, would by the expiration of that time have been fairly and equitably the property of the company and not the property of the city, because a period of thirty years' operation would wear out even rails. But while I do not think the construction to be given includes the rails, yet, even if it did, the familiar maxim of *de minimis non curat praetor* would apply. The matter is of such small account as to be a negligible quantity in this discussion.

In connection with the last mentioned objection it is also urged that the contract is invalid because the commissioners being a mere "building committee" have no authority to make a contract continuing beyond the period required for construction. But this rests upon no better foundation than the others.

In the exercise of purely governmental functions the authorities charged with them are bound to transmit the powers entrusted to them unimpaired to their successors, but in the exercise of proprietary functions, they are controlled by no such rule, because they act and contract for the private benefit of the municipality and its inhabitants, and may exercise their business judgment as private trustees might do. See 1 Dillon, *Munic. Corp.* (3d Ed.), Par. 27 and 66; *Cincinnati v. Cameron*, 33 Ohio St., 336, 367; *Safety Insulated Wire & C. Co. v. Baltimore (City)*, 66 Fed. Rep. 140 (13 C. C. A., 375, 377; 25 U. S. App., 166).

It is clear that if facilities for transportation afforded by a railway are within the purview of the powers vested in the commission—and of this I think there can be no doubt in the present case—then, obviously, these facilities could be paid for out of the funds provided for the general purposes of the work. If no such facilities had existed, the necessity might possibly have justified the construction of a special line of railway at a very large expense; for it will be noted that the power to acquire franchises is expressly given in the act.

But, instead of thus expending the public money, except

for the trackage upon its own grounds, which was manifestly proper, the commissioners, very wisely, as appears, negotiated upon the basis of a mere permit or license, authorizing the use for a limited term of the idle increment of the trackage, for very great and continuing benefits to the city and the public in respect of the water works, present and future, and incidentally providing for the maintenance of the trackage by the lessee and a source of revenue therefrom to the city. Had the same thing been done by a board of directors of a private corporation as trustees for the stockholders, certainly praise, and not censure, would be freely accorded.

The language in the opinion of the case of *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1, 13 (44 C. C. A., 333), exactly applies. This was a decision rendered by Judge Sanborn of the Circuit Court of Appeals, and concurred in by all of the other judges. He says:

"Now, what is the real contention of the counsel for the city here? It is, that while the city council [water works commissioners] might lawfully have contracted for these public utilities, and have taxed its constituents, and have paid out their money to obtain them, it had no power to obtain them, it had no authority to procure them for, and to pay for them with the idle water power [surplus use of trackway] that existed in the water system of the city, without the expenditure of a dollar of the money of the citizens. It is, in fact, that municipal corporations hold all that part of public utilities which they can not apply to customary municipal uses in trust to waste to the loss of their *cestuis que trustent*, and not in trust to use for their benefit. This proposition, when reduced to its last analysis, finds no support in reason or authority. * * * Municipalities and their officers have the power, and it is their duty, to apply the surplus power and use of all public utilities under their control for the benefit of their cities and citizens, provided, always, that such application does not materially impair the usefulness of these facilities for the purposes for which they were primarily created."

Union Pac. Ry. v. Railway, 51 Fed. Rep., 309, 321 (2 C. C. A., 174; 10 U. S. App., 98); affirmed by the U. S. Supreme Court in *Union Pac. Ry. v. Railway*, 163 U. S., 564 (16 Sup. Ct. Rep., 1173; 41 L. Ed., 265). *The Maggie P.*, 25 Fed. Rep., 202. See, also, *State v. Eau Claire (City)*, 40 Wis., 533; *Green Bay & M. C. Co. v. Water-Power Co.*, 70 Wis., 635 (35 N. W. Rep., 525; 36 N. W. Rep., 828); *Bell v. Plattville (City)*, 71 Wis., 139 (36 N. W. Rep., 831); *French v. Quincy*, 85 Mass. (3 Allen), 9; *Worden v. New Bedford*, 131 Mass., 23 (41 Am. Rep., 185); *Camden v. Camden (Vil.)*, 77 Maine, 530, 537 (1 Atl. Rep., 681); *Hendee v. Pinkerton*, 96 Mass., 381, 386; Ch. App., 841-51; 8 H. L. Cas., 712. These are merely a few cases selected out of a very great number which are in full support of these propositions.

If the power to contract in the independent relation of trustees exists, the only question open to discussion concerning a given contract, would be whether, as shown by its terms and scope and the surrounding circumstances, it is an abuse of the powers of the trustees. The time involved in it is simply an element, like any other, to be considered in this connection. Whether or not rights granted under it extend beyond the tenure of the trusteeship, is an immaterial question, unless the contract be of such a nature as that the fact of such extension points to an abuse of power. In this case the time given does not seem to me unreasonable, especially in view of the right of condemnation that existed in favor of the company, independent of the contract.

Indeed, the whole question here is analogous to that involved in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.), 316 (4 L. Ed., 579), where the Supreme Court of the United States, in considering the power of Congress under the Constitution to establish the United States Bank as an agency to facilitate the financial operations of the general government (Chief Justice Marshall delivering the opinion), held:

"If a certain means to carry into effect any of the powers expressly given by the Constitution to the government of

the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

In the statutes under consideration, the commissioners are vested with full power to provide facilities appropriate to the work, and to make contracts.

There is, in the terms of the act, no limitation as to the time for which such contracts may run. For reasons already given, transportation facilities, such as can alone be afforded by a railway operating as a general common carrier, are distinctly within the general scope of the undertaking and are facilities contemplated by the act, by fair intendment, and to contract therefor is within the discretionary power of the commissioners. They have officially declared the necessity for the facilities secured by the contract in question; and I am clearly of opinion that, as such contract is not prohibited in the act, and as it involves no injury, but, on the contrary, is beneficial to the trust, it is within the discretionary power vested in them, is a proper exercise of that power and is not open to judicial question. For the same reasons, I am satisfied, also, that no action of the legislative body of the city was or is necessary to give it validity.

See, in support of these views, the opinion of the United States Circuit Court of Appeals in *Illinois Tr. & Sav. Bank v. Arkansas City*, 76 Fed. Rep., 271, 282 (22 C. C. A., 171; 40 U. S. App., 257).

It was stated in argument that the grant of a right of way through the water works property to the Cincinnati & Eastern railway, was confirmed by a formal ordinance of the board of legislation of the city. This fact can have no force as an argument here, because, among other reasons, while the permission of the commissioners was in that case necessary in the first instance, the character of the use may not have been so connected with the needs of the enterprise as to bring it fairly within the scope of their independent action, and hence might require the approval of the city authorities.

But we are not called upon to decide that question here.

For all reasons given, and upon full consideration both of the merits of the case and the special defenses urged, judgment must be rendered against the plaintiff; and in view of the circumstances attending the bringing of the suit, the judgment must be with costs; and it is so ordered.

Judgment dismissing the action at costs of plaintiff.

C. J. Hunt, Corporation Counsel, for city.

J. B. Frenkel, for water works commissioners.

F. F. Dinsmore, for railroad company.

WILLIAM HILLENBRAND *v.* BUILDING TRADES COUNCIL
ET AL.

1. It is a violation of the legal right of the employer for third persons, either individually or collectively, to maliciously and without legal justification induce or coerce his workmen to leave his employment, or to solicit them to join a labor union, with intent to injure the employer in his business, or compel him to accede to the demands of the union.
2. Where the employer is unlawfully induced or coerced to discharge his workmen by reason of the malicious interference of individuals or combinations of individuals, the workmen may invoke the same law and are entitled to the same remedies as the employer against such interference.
3. Equity has jurisdiction, notwithstanding there may exist a legal remedy, to interfere by injunction to prevent a continuing injury, when the legal remedy therefor may involve a multiplicity of suits or the injury threatens an irreparable damage.
4. Equity looks through the form to the substance, and, in giving effect to the rule that wherever there is a wrong, there is a remedy, it will always consider the injury to be remedied rather than indulge in overnice discrimination as to the means or instrumentalities employed in producing the injury; and where the intent to injure is shown, together with acts pursuant thereto which tend to, and do in fact, produce injury, the nature of the acts is immaterial.
5. The display of force, though none is actually used, such as where

groups of members of a labor union visit non-union workmen at their homes or places of work in pursuance of an unlawful purpose against the employer, is "intimidation," and unlawful.

6. Those who knowingly and intentionally aid and abet a conspiracy, or other *quasi* criminal proceeding, are liable as principals.
7. An unincorporated labor union, which is joined as a codefendant with its individual members upon whom service may be had in their representative capacity, may be enjoined, as such, from unlawfully interfering with non-union workmen and their employer; and the injunction, when served upon the representative members of the union, will be binding upon the union, as an entity, and all its individual members, whether the latter be directly represented or not.

HOSEA, J.

The testimony in this case clearly shows the following facts:

Plaintiff is proprietor of a plumbing business in Cincinnati, in which he employs labor; and, predicated upon the use of his capital in the purchase of material and upon his right to employ labor, takes contracts for the plumbing work and equipment of buildings, public and private, in which the work of skilled plumbers is a vital element. He alleges, in this suit, unlawful and injurious interference in his business by defendants and asks protection against further wrongs of like nature by injunction of this court restraining the defendants collectively and individually.

Collectively, the defendants constitute two labor organizations known as unions, to-wit: The organization of plumbers known as "Local No. 59," being a local branch of the "United Association of Journeymen Plumbers, Gas Fitters, Steam Fitters and Steam Fitters' Helpers, of the United States and Canada," and the "Building Trades Council of Cincinnati and Vicinity." Both these are voluntary—that is, unincorporated—associations, having written constitutions and by-laws which are in evidence by printed copies.

On or about November 10, 1903, a "strike" was declared against plaintiff by the plumbers' local No. 59, and a number of his workmen called out by its order and prevented

from continuing in his employment. It is shown that he was at this time engaged in the performance of various public and private contracts, or so-called "jobs," in various parts of the city and in various stages of completion, on which his employes were then at work. There was no question of dispute or dissatisfaction, whatever, between himself and any of these workmen concerning wages, hours of service, conditions of employment or any other matters affecting the relations of employer and employed. It is shown that immediately upon calling out the men who were members of the union, they and others were appointed on so-called "strike committees" by the union, and a systematic campaign was inaugurated against plaintiff, with the object, as admitted in evidence, of inducing his remaining employes and all those employed by him in place of strikers, to quit his service and refuse to be employed by him, in order to prevent him from securing new men; and to induce such of these as were non-union men to join the plumbers' union—all as a means to the end of compelling him to accede to the demand of the plumbers' union. This demand, briefly stated, was that he should pay a fine assessed against a member of their union in his employment, or compel the member to pay it, or discharge said employe—who was his own son—the alternative being the strike and its consequences.

Plaintiff meantime made various efforts to continue his business and perform his outstanding contracts by employing other men, using boys and apprentices, and by endeavors to win back some of the striking employes who had been with him for many years, all at increased prices, and with indifferent success. The "jobs" where his men were at work were visited by groups of strikers and committees, members of the plumbers' union, accompanied, in some instances, by the walking delegates of the Building Trades Council, and the work interfered with and his men enticed away.

In one such instance an employe who returned to work was treacherously and brutally attacked and severely injured while at work, by two men who called him a "scab"

and assaulted him in the presence of a member of the plumbers' union who was subsequently tried, convicted and fined, in the police court of Cincinnati, for participation in the assault, and whose fine was paid by the financial secretary of the plumbers' union in the presence of the business agent of the Building Trades Council. The payment of this fine by the financial secretary of the plumbers' union No. 59 is admitted; and its officers also admit, on the stand, that no action by way of disclaimer or otherwise was taken by said union to deny its responsibility for the assault or to repudiate methods of this character in the conduct of the strike. It is also in evidence that daily meetings of the strike committees, business agents, and other officers, were held, at which detailed reports of all matters were required to be made, and it is admitted that the facts of the assault were known to all.

In another instance, shortly before the above assault, this same employe was visited by a group of members of the plumbers' union, at his house, after dark and, as he testifies, assaulted near by. The visiting parties, although members of the union, claim to have acted in this instance as volunteers, and while denying direct assault, admit that the "argument" was "very heated."

Other details in testimony of the defendants themselves, of the visits to workmen engaged on jobs,—such as demanding and tearing up the union cards of apprentices, making insulting suggestions, making direct and indirect references to the power of the union to exclude from membership those who might wish to join, or to impose heavy penalties by way of initiation fees, or to impose fines upon members,—all show that the general character of the argument used by way of so called "persuasion" was of a coercive and intimidating character throughout, and bear so cogent a relation to the actual assaults as to show the unlawful character and purposes of the campaign waged against the plaintiff through his employes.

Plaintiff testifies to the condition thus created as being disastrous to his business, rendering it impossible for him to take new contracts, and difficult to perform his existing

obligations, and to the general annoyance and pecuniary loss resulting therefrom.

In ascertaining the law applicable to the case I propose to consider the facts from the standpoint of fundamental rights and remedies, first, with reference to the defendants as individuals, and, second, as to the collective bodies as such.

The first of these lines of inquiry, starting with the conceded proposition that workmen have the right to quit their employment, brings us to the consideration of their legal rights after they have quit; and the second involves the question, whether, having assumed to act collectively under a definite form of organization, they may be dealt with and restrained in their organized capacity from collective acts producing collective wrong and injury.

We may take, as a starting-point, the corner-stone of the common law; namely, that wherever there is a wrong there the law furnishes a remedy. As quaintly expressed in Comyn's Digest, Title "Action on the Case," A:

"In all cases where a man hath a temporal loss or damage by the wrong of another he may have an action on the case to be repaired in damages. The intentional causing such a loss to another without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong."

This principle has been applied and enforced from the earliest history of English jurisprudence, and has been applied from a very early period, to cases where, by inducement and persuasion, workmen were enticed away from the service of an employer. And, singularly enough, at the very outset we find the argument made at the bar in this case, namely: that the injury caused by enticing away workmen is *damnum absque injuria*, because the contract of the workman is indeterminate and terminable at will, is answered in one of the earliest cases by one of the ablest and most distinguished judges that ever graced the English bench.

In *Hart v. Aldrich*, Cowp. 54 (1774), journeymen shoemakers, working by the piece and for no determinate time,

were enticed away, to the damage of the employer in his business. Lord Holt sustained the case upon the ground that such a servant is, in law, a servant by the day, whether the work is by the piece or by the day.

In *Gunter v. Astor*, 4 Moore J. B., 12 (1819), the defendants clandestinely sent for the workmen of plaintiff, got them intoxicated and induced them to sign an agreement to leave the plaintiff and to come to them. It was held that as the act was of several and the end unlawful it amounted to a conspiracy.

In *Lumley v. Gye*, 2 Ell. & Bl., 216 (1853), the case was made out under a statute known as the statute of laborers, but the court declared that an action lay independently of the statute for maliciously inducing another to break a contract of any description where damage ensues to the party with whom the contract was made; and, where two or more parties were concerned in inflicting such injury, an indictment or writ of conspiracy at common law might be maintainable.

In *Walker v. Cronin*, 107 Mass., 555 (1871), the Supreme Court of Massachusetts enforced the same doctrines against a defendant who enticed away workmen in a shoe factory whereby the plaintiff lost their services and incurred expense in procuring others whom it was obliged to employ at higher wages. The court, speaking by Justice Wells, says:

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right of contract or otherwise is interfered with. But if it comes from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands on a different

footing, and falls within the principle of the authorities first referred to."

See also *Snow v. Wheeler*, 113 Mass., 179; *Dudley v. Briggs*, 141 Mass., 582 (6 N. E. Rep., 717; 5515 Am. St. Rep., 494); *Moran v. Dunphy*, 177 Mass., 485 (59 N. E. Rep., 125; 83 Am. St. Rep., 289).

In *Haskins v. Royster*, 70 N. C., 601 (16 Am. Rep., 780—1874), the Supreme Court of North Carolina adopted and enforced these principles and sustained a case of damages for enticing away laborers during the harvesting season, and in the course of the opinion say:

"Any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages."

In *Bowen v. Hall*, 6 Q. B., 333 (1881), nearly thirty years after the decision in *Lumley v. Gye*, *supra*, the Queen's Bench again carefully considered and affirmed the doctrine thus established, and said, by Brett, L. J.:

"Whenever a man does an act which in law and in fact is a wrongful act, such as may, as a natural and probable consequence of it, produce injury to another—and, in the particular case, does produce such an injury—an action on the case will lie. And the action does not the less lie because the consequence of the act complained of is the act of a third person. If the persuasion is used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which in law and in fact is a wrongful act."

In *Angle v. Railway*, 151 U. S., 1, 13 (14 Sup. Ct. Rep., 240; 38 L. Ed., 55), the Supreme Court of the United States reviewed the authorities upon this doctrine, citing them with approval and deducing therefrom the application of the rule to "every case where one person maliciously persuades another to break any contract with a third per-

son," and holds that it is not confined to contracts of service.

I have preferred thus to trace the law anew to its sources, to show that the principles to be applied to so-called "labor" cases are neither new nor strained doctrines, but are as ancient as the law itself, resting "not"—as Lord Holt aptly says in the still earlier case of *Ashby v. White*—"upon particular instances and precedents, but upon the reason of the law, '*ubi eadem ratio ibi idem jus.*'"

The modern rule is simply this ancient rule stated in modern terms of thought and application. A comparatively recent expression of the Supreme Court of Illinois will illustrate this. I quote from *Doremus v. Hennessy*, 176 Ill., 608, 614 (52 N. E. Rep., 924; 54 N. E. Rep., 524; 43 L. R. A., 797; 68 Am. St. Rep., 203), as follows:

"The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done, which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require."

Chief Justice Chatman, of the supreme judicial court of Massachusetts, in the case of *Carew v. Rutherford*, 106 Mass., 1 (8 Am. Rep. 287, 291), thus expresses it:

"Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace."

In *Knudsen v. Benn*, 123 Fed. Rep. 630, 638, a distinguished judge of the federal court, says:

"Fellow workmen may agree together to leave at once the service of their employer; but having done so, and being no longer interested in the matter, then, notwithstanding certain *dicta* in cases that have been read from, it does not seem clear that they are acting lawfully when they are persuading the servants of their former employer to break their contracts and leave the service. It is a matter that does not concern them any longer. It is a matter that is apparently injurious to their former employer. It seems to me that such an interference in a matter with which they have no rightful concern and which is injurious to another is not lawful. * * * they have no right to interfere with that business in any way."

These cases I have selected from many, as illustrative, merely, to show clearly the nature of the rule of law in general terms, applicable primarily to individuals, but also to combinations as such, where acts are done in a collective capacity.

It will be observed that the question is, broadly, of wrong and remedy. The wrong is the injury causing loss or damage; and the jurisdiction of equity to prevent such wrong by its restraining power has been long settled.

In *Barr v. Trades Council*, 53 N. J. Eq. (30 Atl. Rep., 881, 890), it is said:

"Even when there is a legal remedy, equity will interfere by injunction to prevent (1) an injury which threatens an irreparable damage, or (2) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits. This jurisdiction is established and unquestionable."

A very pertinent and forceful expression as to the nature of the injury inflicted upon an employer by seducing away workmen, is given in the case of *Frank v. Herold*, 52 Atl. Rep., 152 (63 N. J. Eq., 443), as follows:

"In doing so they are inflicting an injury upon the complainants, in respect to their private rights, precisely the same as they would if they broke, interfered with or clogged the engine that drove their machinery, and for such injury

the complainants are entitled to a legal remedy by action. Now, this being so, the next question is, what right have the complainants here in this court asking for the restraining power of the court? The answer to this is twofold: First, it is quite plain that the relief in damages to be recovered in an action at law is entirely inadequate. It is quite absurd to say that they can sue each of these persons, and recover damages against them in separate suits, for every little act, which, in the aggregate, tends to result in injury. And, in the second place, the injury is continuing and irreparable, and not capable of admeasurement, according to legal principles. So that, at law, the remedy is entirely inadequate. It is, therefore, a clear case for the interposition of a court of equity to exercise its preventive remedy, and that is the particular sphere at this day of a court of equity, as contradistinguished from a court of law."

In giving effect to the principle of law invoked—namely, that for the wrong inflicted the plaintiff has a right to a remedy—a court of equity, which looks through the form to the substance, will consider the injury to be remedied rather than indulge in overnice discrimination as to the means or instrumentalities employed in producing the injury. Where the intent to injure is shown, together with acts pursuant thereto which tend to and do in fact produce the injury, the nature of the acts is immaterial. It is quite true that certain acts, considered by themselves, might, under proper circumstances, be regarded as the exercise of the ordinary rights of a citizen; but, when taken in connection with the object, and the time, place and circumstances of the occurrence, are component parts of a plan or scheme whose unlawfulness permeates every single step of its progress. As was said in *Barr v. Trades Council*, 53 N. J. Eq., 101 (30 Atl. Rep., 881, 886):

"Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation. The court looks through the instrumentality or means used to the wrong perpetrated with the malicious intent, and bases the right of action upon that." Approved in *Van Horn v.*

Van Horn, 56 N. J. Law, 318 (28 Atl. Rep., 669; 10 L. R. A., 184).

This was particularized with reference to cases like the present, in *Jersey City Ptg. Co. v. Cassidy*, 53 Atl. Rep., 230, 232 (63 N. J. Eq., 759), as follows:

"That the interest of an employer or an employe in a contract for services is property, is conceded. Where defendants in combination or individually undertake to interfere with and disrupt existing contract relations between the employer and employe, it is plain that a property right is directly invaded. The effect is the same whether the means employed to cause the workman to break his contract and thus injure the employer are violence or threats of violence against the employe, or mere molestation, annoyance, or persuasions. In all these cases whatever the means may be, they constituted the cause of the breaking of a contract, and consequently they constitute the natural and proximate cause of damage."

The rule is again well stated in *Lucke v. Cutters & Trimmers' Assembly*, 77 Md., 396 (26 Atl. Rep., 505; 19 L. R. A., 408; 39 Am. St. Rep., 421), and the distinction drawn between persuasion, which may be a lawful act and persuasion used as the instrument of accomplishing an unlawful purpose. Paraphrasing the language of *Bowen v. Hall*, *supra*, the court says:

"'Merely to persuade a person to break his contract may or may not be wrongful in law or fact, * * * but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrongful act, and therefore an actionable act, if injury follows from it.'"

These principles are set forth in *London Guarantee & Acc. Co. v. Horn*, 101 Ill. App., 355; *Moran v. Dunphy*, 177 Mass., 485, 492 (59 N. E. Rep., 125; 83 Am. St. Rep., 289); *Richards, Ex parte*, 117 Fed. Rep., 658; *Southern Ry. v. Local Union*, 111 Fed. Rep., 49; *Debs, In re*, 158

U. S., 564 (15 Sup. Ct. Rep., 900; 39 L. Ed., 1092); *Flaccus v. Smith*, 199 Pa. St., 128 (48 Atl. Rep., 894; 54 L. R. A., 640; 85 Am. St. Rep., 779), and in other cases to which I will make more specific reference later.

It may be noted, in passing, that the rule as to unlawfully interfering between any employer and his workmen is not a one-sided rule, but works both ways, thus illustrating the remark of Lord Holt, cited, that where the reason is the same, the law is the same. So that, in cases where by malicious interference of others the employer is induced to discharge his workmen, the workmen may invoke the same law and have the same remedy.

The general principle, thus seen to be well established in the law from the earliest times, is the same that I had occasion to state in general terms in the case of *Cincinnati Beveling & Sil. Co. v. Precht*, in this court in May last as follows:

“The Bill of Rights embodied in the Constitution of Ohio guarantees to every citizen, an inalienable right—among others—of acquiring, possessing, and protecting property and of seeking and obtaining happiness and safety; and it is therein further provided that courts shall be open to every one for the exercise of his remedy by due course of law for an injury done him in his land, goods or person. No one need be told that the right to carry on legitimate business freely, without molestation or hindrance, is not only the right and privilege of the citizen under these fundamental guarantees of the Constitution, but is essential to the well-being of every civilized community; and that it is the duty of the courts to afford every reasonable protection to the exercise of such right. The right of the laboring man, whose business capital is his skill and industry, is to be upheld and protected equally with the right of an employer of labor to carry on a manufacture involving such employment; and the fact that these rights are reciprocal, in no wise lessens the obligation of the courts to see that both are properly protected.”

This court has on various other occasions been called

upon to apply these obviously just principles in cases of this general nature, some of which counsel have referred to in argument.

It remains, in concluding this branch of the case, to refer to a few modern decisions of high authority bearing more directly upon certain phases of the acts of the defendants.

The practice of soliciting workmen to join a labor union, when done, as in the present case, with intent to injure an employer in his business or compel him to accede to the demands of the union, is unlawful and may be restrained.

In *Flaccus v. Smith*, 199 Pa. St., 128 (48 Atl. Rep., 894, 895; 54 L. R. A., 640; 85 Am. St. Rep., 779), this was prohibited in the injunction order, the court saying:

"The appellee had an unquestioned right, in the conduct of his business, to employ workmen who were independent of any labor union, and he had the further right to adopt a system of apprenticeship which excluded his apprentices from membership in such a union. He was responsible to no one for his reasons in adopting such a system, and no one had a right to interfere with it to his prejudice or injury."

To the same effect, see *Lucke v. Cutters' & Trimmers' Assembly*, *supra*; *O'Neil v. Behanna*, 182 Pa. St., 236 (37 Atl. Rep., 843; 61 Am. St. Rep., 102); *Curran v. Galen*, 152 N. Y., 33 (46 N. E. Rep., 297; 37 L. R. A., 802; 57 Am. St. Rep., 496); *Moran v. Dunphy*, *supra*; *Barr v. Trades Council*, *supra*.

This principle has quite recently been applied in the case of *United States Ptg. Co. v. Stereotypers' Union* by the Supreme Court of Brooklyn, to which I shall have occasion to advert later on.

Visiting "jobs" where workmen are employed, to persuade workmen to quit service or to join the union, has been repeatedly condemned as unlawful. The language of the court in *O'Neil v. Behanna*, *supra*, page 844, is as follows:

"It is further urged that the strikers, through their com-

mittees, only exercised ('insisted on' is the phrase their counsel used in this court) their right to talk to the new men to persuade them not to go to work. There was no such right. These men were there presumably under contract with the plaintiff, and certainly in search of work, if not actually under pay. They were not at leisure, and their time, whether their own or their employer's, could not lawfully be taken up, and their progress interfered with, by these or any other outsiders, on any pretense or under any claim of right to argue or persuade them to break their contracts. Even, therefore, if the arguments and persuasion had been confined to lawful means, they were exerted at an improper time, and were an interference with the plaintiff's rights, which made the perpetrators liable for any damages the plaintiff suffered in consequence."

See, in support, *Flaccus v. Smith*, *supra*; *Richards, Ex parte*, 117 Fed. Rep., 658; *Southern Ry. v. Local Union*, 111 Fed. Rep., 49.

Visiting employes at their homes, or at their places of work in groups in pursuance of the unlawful purpose against the employer, is of itself intimidation.

In *O'Neil v. Behanna*, *supra*, page 843, the court says:

"The 'arguments,' 'persuasion' and 'appeals' of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawlessness. The display of force, though none is actually used, is intimidation, and is as much unlawful as violence itself."

The application of this rule to the circumstances of the visit of various members of the plumbers' union to Black, will be sufficiently obvious, as indeed to all the visits of committees and individuals in groups of four to six or more, to the plaintiff's employes.

The remarks of Justice Brewer of the United States Supreme Court in his address before the New York Bar Association in 1893 are also instructive on this point. He says:

"When laborers gather round and say to those who seek employment that they had better not, and when that advice

is supplemented by assault on one who disregards it, every one knows that something more than advice is intended. It is coercion—force; it is the effort of the many by the mere weight of numbers to compel the one to do their bidding; it is a proceeding outside of the law, in defiance of the law; and in spirit and effect an attempt to strip from one that which of right belongs to him—the full and undisturbed use of his own.”

Such also is the language of Judge Smith of this court in *Eureka Foundry Co. v. Lecker*, 13 Dec., 398, 402:

“Any course of conduct upon the part of others which deprives or substantially affects the freedom of mind of such workmen in reaching a decision to remain with him, or the freedom of will in carrying that decision into execution, is an unlawful interference with the right of the owner of the business.”

This is practically the view of the supreme court of Massachusetts as expressed in *Plant v. Woods*, 176 Mass., 492, 493 (57 N. E. Rep., 1011, 1015; 51 L. R. A., 339; 79 Am. St. Rep., 330):

“It is true they committed no acts of personal violence, or physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this.”

I will refer here to but one more case, for its aptness as a close illustration of the methods and acts shown in the case at bar, namely, *Carew v. Rutherford*, 106 Mass., 1 (8 Am. Rep., 287, 294), in which it was said:

“We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order

to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he can not carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage done to him. It is a species of annoyance and extortion which the common law has never tolerated.

"This principle does not interfere with the freedom of business, but protects it."

There can be no question under the evidence in this case that the acts complained of and shown to have been committed by the individual defendants were unlawful.

We proceed now to inquire as to the responsibility of the organized bodies which are also made defendants.

It is clear, from the testimony in this case, that the direct source and controlling influence of whatever wrong and injury has been suffered by the plaintiff, is the plumbers' union local No. 59, and the individual defendants were its instruments.

The Building Trades Council, occupying the relation of a co-operative organization composed of delegates of the plumbers' union and other unions, is liable as an accessory, under the evidence and admissions showing the official action giving its moral countenance and support and furnishing money to the plumbers' union under circumstances showing knowledge that the funds were to be used in aid of the strike, and evidence showing the direct participation in the details of carrying on the campaign of so-called "persuasion" by and through its walking delegate or business agent, all within the substantial purposes of its organization as shown by its constitution and by-laws. It is fundamental law in conspiracy and other *quasi* criminal proceed-

ings that those who aid and abet with knowledge and intention are equally liable with the principals.

Farther than this it does not seem to me necessary to refer to the constitutional or declared purposes of the defendant unions. It will be sufficient for the purposes of this case to note that they are highly specialized organizations of a permanent character, having the form and many of the characteristics of corporate bodies.

The courts heretofore generally in dealing with cases such as the one at bar have treated the unlawful acts as those of individuals engaged in a conspiracy with reference to the immediate purpose evidenced by the acts in question, as in the early cases of *Gunter v. Astor* and *Lumley v. Gye*, *supra*, and as will appear in a few more modern cases to which I will now refer.

Thus in *Plant v. Woods*, *supra*, there was shown a combination of unions to coerce the employer to discharge employes who refused to join the union, and the court said of it, page 1015:

"Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws. The language used by this court in *Carew v. Rutherford*, 106 Mass., 1, may be repeated here with emphasis, as applicable to this case: 'The facts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and, if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both.'"

In *Boutwell v. Marr*, 42 Atl. Rep., 607, 609 (71 Vt., 1; 43 L. R. A., 803; 76 Am. St. Rep., 746), there was shown a combination of employers for an unlawful purpose, and the Supreme Court of Vermont had this to say in the opinion:

"Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that

when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion."

The Supreme Court of Wisconsin has spoken in similar terms of such combinations, as will appear from the following taken from the opinion in *Gatzow v. Buening*, 81 N. W. Rep., 1003 (106 Wis., 1; 49 L. R. A., 475; 80 Am. St. Rep., 17):

"If an unlawful combination exists, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes to interfere with individual liberty and with the public interests. * * *

"The union under consideration is within the condemnation of the common-law rule that a combination of persons, natural or artificial, to restrict legitimate trade in any field, by hampering or destroying individual liberty, stifling competition or preventing the exercise of individual freedom to dispose of one's labor or capital according to his own free will, so long as the legal rights of other persons are not infringed upon, is unlawful."

Judge Smith, of this court, in the case of *Graf v. Master Horseshoers' Protective Assn.*, 15 Dec., 18. a case arising between an organized association of boss horseshoers and one of its members upon a rule or by-law of the association, has enforced the general principle, and used this language in his opinion, the defendants being incorporated:

"The principle is well settled that contracts, agreements, combinations or arrangements between persons in the same business, the tendency of which is to impair competition and enhance prices, to the injury of the public, are against

public policy and therefore illegal and void; and as the combined action of the members of this association is to prevent competition among such members and to increase the price of horseshoeing to the public, any resolution or by-law whose object is to effect such combined action is illegal and void." Citing *Emery v. Candle Co.*, 47 Ohio St., 320; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St., 666; *State v. Oil Co.*, 49 Ohio St., 137. * * *

"Nor would the language used be any the less a threat because when used alone it appeared harmless, but when used in connection with the tone of voice in which it was expressed, the gestures accompanying it or other surrounding circumstances, it conveyed to the mind a threat. A veiled threat is still a threat."

The court also refers to *Bailey v. Plumbers' Assn.*, 52 S. W. Rep., 853 (103 Tenn., 99; 46 L. R. A., 561); *Congress & Empire Spring Co. v. Knowlton*, 103 U. S., 49 (26 L. Ed., 347); *Hafer v. Railway*, 9 Re., 470 (14 Bull., 68); *McCutcheon v. Capsule Co.*, 71 Fed. Rep., 787.

These latter cases, referring to associations of employers, are noteworthy in this connection as illustrating the entire impartiality of the fundamental rule of law stated by Lord Holt, and referred to earlier in this opinion, that where a like reason exists, there the law applicable is the same. In other words, the law, upon principles the same, will be enforced against employers as well as those employed.

In *United States v. Weber*, 114 Fed. Rep., 950, 953, it is said:

"The right of the employes of the receivers to voluntarily join a union that has only legal purposes in view can not be denied. * * * But if the object of the union is illegal, or if the methods employed by it, either to induce acquisitions to its ranks or to accomplish its ulterior purposes, are illegal, it appears to be well settled that the persons who combine in such efforts are conspirators."

The case of *Quinn v. Leathem*, H. of L., 1901, 85 Law Times, 298, is also instructive as showing the views of the

eminent judges of the House of Lords as to the same general principle. This was a suit in damages against a union of journeymen butchers for enforcing a rule of the union prohibiting its members from working with non-union butchers, or from handling meat received from a place where non-union men were employed. Damages to the extent of \$1,250 were enforced against the union through its treasurer, Quinn. On appeal the judgment was affirmed and Lord Lindley, in delivering his opinion, said:

"As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided that he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty without justification. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."

As showing the general consensus of judicial opinion as deduced from a long list of cases in courts of last resort, the following summary from 18 Am. & Eng. Ency. Law (2d Ed.), 84, 85, is significant:

"The means by which a labor combination seeks to effect its purposes is that of inflicting injury upon its opponent or of inspiring him with fear of injury. Coupled with its demands it always expressly or impliedly holds out as an alternative the displeasure of the union, and the injurious consequences flowing therefrom. Whether a combination to effect an end by these means is criminal or not depends upon the lawfulness of the mode in which the injury is inflicted or threatened; that is, whether it is an actionable wrong, or is merely such as the law denominates *damnum absque injuria*. * * *

"But to be unlawful it is not necessary that the intimidation should be directed against the employer, or that there should be any overt act of violence, or any direct threat by word of mouth. If the members of a labor union, by previous agreement or concerted action, congregate at or near the works of an employer with the intention of intimidating the employes of the establishment by displaying opposition to the course pursued by such employes in continuing to work, such combination is unlawful, and all persons engaged therein are guilty of conspiracy. * * *

"But the means employed by a labor union, in order to be illegal, need not be carried to the length of violence or intimidation. Acts creating a nuisance intended to annoy and disturb an employer, his workmen or customers, in the enjoyment of their several rights, are illegal, and those who by preconcert perform these acts are guilty of criminal conspiracy."

I will conclude the citations of authority on this point by the following extract from the award of the Anthracite Coal Commission, a body of distinguished men appointed by the President, representing in its membership the cause of labor as well as other interests concerned, whose deliberate and official utterance is, therefore, of especial value:

"It is the legal right of any man, or set of men, to voluntarily refrain from social intercourse or business relations with any person whom he or they, with or without good reason, dislike. This may sometimes be unchristian, but it is not illegal. But when it is a concerted purpose of a number of persons not only to abstain themselves from such intercourse, but to render the life of their victim miserable by persuading and intimidating others so to refrain, such purpose is a malicious one, and the concerted attempt to accomplish it is a conspiracy at common law, and merits and should receive the punishment due to such a crime."

I pass now to the final important matter presented in this case.

The labor unions made defendants in this case, having assumed permanence of form as organized bodies, acting with all the precision, certainty and force of incorporated bodies, and having instituted, directed and carried out the unlawful acts shown, through and by means of their machinery of organization, and through the individual defendants as its instruments, the question naturally arises: whether they should not be treated in their collective capacity as wrongdoers and held liable as such for the collective wrongs?

The ancient rule of the common law, cited in the beginning of this opinion, is unlimited in its terms, and, to be fully effective, should be unlimited in its application; and it is obvious that this can not be so if it can not furnish a collective remedy for a collective wrong.

The doctrines of conspiracy do not fully reach the point in question; and the rigidity of common law rules preclude that full and flexible adaptation of remedy that is desirable. For this reason we must look to equity for solution of the problem.

It is a cardinal principle of equity that it looks through the forms of things to the substance; and, acting upon this principle, courts of equity early recognized the necessity of a collective remedy. The problem of adapting legal proceedings to unincorporated societies consisting of many members is not new, but arose from the difficulty of applying the rigid rules of the common law to just such cases, and to avoid the necessity of a multiplicity of actions where the community of interest was not embodied in recognized legal entities, such as partnerships or corporations, but nevertheless existed.

This rule of equity procedure, long recognized in the chancery jurisdiction of England, has also long been embodied in the statute law of this state.

Section 5008, Revised Statutes, provides that:

"When the question is one of a common or general interest of many persons, or when the parties are very numerous,

and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

This section was considered and construed in the case of *Platt v. Colvin*, 50 Ohio St., 703, upon the objection that the plaintiff, who was president of an association of about 1,000 shareholders, was but one of many in interest. The court finds that the association was not a partnership under our statute, and could not act in its partnership name. It then refers to the rule of equity as stated in Story, Eq. Pl., Section 97, formulating the exceptions to the rule requiring prosecutions by all parties in interest, as follows:

(1) Where the question is one of a common or general interest and one or more sue or defend for the benefit of the whole.

(2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.

(3) Where the parties are very numerous and although they may have separate and distinct interests, yet it is impracticable to bring them all before the court.

By way of illustrating the application of the principle, the court cites *Taylor v. Salmon*, 4 Myl. & Cr. (18 Eng. Ch. Rep.), 134, a suit by directors of an unincorporated mining company, wherein Lord Chancellor Cottenham held that where parties were numerous and the suit was for an object common to all, some of the body might maintain a bill on behalf of themselves and the others.

Also, *Walworth v. Holt*, 4 Myl. & Cr., 619, where, in a similar suit by certain members of a shareholding company, for unpaid subscriptions, a demurrer for like cause was overruled. And in this case the lord chancellor makes the following noteworthy observation: That it was the duty of the court, "to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy."

Also, *Small v. Atwood*, 1 Younge, 407, wherein Lord Chief Baron Lyndhurst enforced the same doctrine, holding the exception to have been established at a very early period for the purpose of preventing a failure of justice.

Also, *Chancey v. May*, Prec. Ch., 592, a suit brought by the treasurer and managers of an unincorporated company on behalf of themselves and all other proprietors, charging the late treasurer and managers with embezzlement of the partnership funds, and the same rule was enforced for like reasons.

"This rule, and its exceptions," says our Supreme Court, "in their breadth and substance were adopted in our code, Sections 4993, 5007, 5008, Revised Statutes; and, by its provisions made applicable to our civil action, which was substituted for what was theretofore known as a suit in equity, and the action at law. * * * Indeed, the mode of procedure in the civil action, is, in most respects, taken from and assimilated to that which prevailed in a suit in chancery."

And the court in applying these principles overrules objections and sustains the suit, saying further:

"We see no reason why judgment against the plaintiff will not be binding upon all whom he represents, or judgment in his favor inure to their benefit. Each stockholder, by becoming a member of the association, gave his consent to the rule of its being, that suits in its behalf might be presented according to the law applicable to it, and the judgment in any action so prosecuted with its consent must necessarily operate upon all as if they were named in the suit."

Labor unions have been recognized by law in Ohio as entities capable of exercising the rights of individuals, as in the trades union acts of Great Britain. Thus, by Sections 4364-49, Revised Statutes, they are authorized to adopt and possess a trade-mark label in the union name, which name may be registered as such with the secretary of state (Section 4364-51). They may sue to enjoin the unauthorized use of such labels (Section 4364-53); or to recover the

penalty (Section 4364-53a); and, where unincorporated, may, by special statute, sue by an officer or member for the benefit of all (Section 4364-53a, Revised Statutes), which recognizes the application of the equity rule. Indeed, the Legislature has attempted to make it unlawful to prevent men from joining labor unions or to discharge from employment because of such membership. Section 4364-68, Revised Statutes.

Those statutes are analogous in certain respects to the trades union acts of England, in so far as they recognize and establish the labor union as a distinct entity in its collective capacity, capable of holding property and exercising rights of ownership; and by consequence being subject to corresponding liabilities.

This view is sustained and established by a recent case of highest authority arising in the court of King's Bench in England, viz.: *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, L. R. (1901), 426. In this case Farrell, J., issued an injunction against the respondent society, also against Bell, its general secretary, and Holmes, its organizing secretary, which was reconsidered and affirmed upon motion to strike out the name of the respondent society.

The injunction order restrained the society, its servants, etc., from watching or besetting the railway station or works, or approaches thereto, or places of residence of any of its officers or workmen employed or proposing to work for them, for the purpose of persuading or otherwise preventing persons from working or for any purpose except to obtain or communicate information, and from procuring any person who had or might enter into any contracts with the plaintiff to commit a breach of such contracts.

The motion was, substantially as in the case at bar, upon the ground that the society was not a corporation nor an individual, and could not be sued in a *quasi* corporate capacity. The court in its opinion admits that it is not a corporation nor an individual nor a partnership; but defines the union under the trades union acts as "any combination for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any

trade or business." The argument on the motion was that it was an illegal association, which the court intimates had no force in an action in tort, saying:

"The acts complained of are the acts of the association. They are the acts done by their agents in the course of the management and direction of a strike; the undertaking such management and direction is one of the main objects of the defendant society and it is perfectly lawful: but the society, in undertaking the management and direction, undertook also the responsibility for the manner in which the strike is carried out. The fact that no action could be brought at law or in equity to compel the society to interfere or refrain from interfering in the strike is immaterial; it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such wrongs, arising as they do from the wrongful conduct of the agents of the society in the course of managing the strike which is a lawful object of the society, the defendant society is, in my opinion, liable."

The appeal court reversed this ruling and the case then came on for review by the judiciary committee of the House of Lords, of which the most eminent jurists of England are members, and by unanimous judgment the appeal court was reversed and the ruling and opinion of Farwell, J., restored. I shall refer only to the expressed views of one or two of the judges.

Lord McNaughten held, among other things, that persons should be liable for concerted as well as individual action whatever be the form of association; that they might be sued in a representative action whether registered or unregistered. "The registered name," he said, "is nothing more than the collective name for all its members."

Lord Lindley, one of the ablest of all the bench, referring to the principle of equity procedure (which is embodied in Section 5008, Revised Statutes), said: "The principle is applicable to new cases as well as old and ought to be applied to the exigencies of modern life as occasion requires," and proceeds to show that if the trustees in whom

the property of the society is vested were added as parties, an order could be made for payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment.

To the same substantial effect is *United States v. Coal Dealers' Assn.*, 85 Fed. Rep., 252. Also *United States Ptg. Co. v. Stereotypers' Union*, Supreme Court of Brooklyn. This case, not yet reported, involved, as I am advised, the same question as to the right to enjoin unions as such. Suit was brought to enjoin execution of contract between plaintiff and defendants whereby plaintiff was to discharge all its non-union workmen who should not have joined one or the other of the defendant unions before a certain date.

In granting the injunction, Justice Dickey says:

"If the purpose of the unions in their agreements was to hamper or restrict the freedom of plaintiff and other workmen in pursuing their lawful trade, and, through arrangements with their employers, coerce them to become members of union organizations, or lose their positions, or be deprived of employment, such purpose is against public policy and is unlawful. The unions can not arrange a plan of compelling workmen not in affiliation with their organization to join them at the price of being deprived of their employment."

In view of these authorities, supplementing the rulings of our Supreme Court, I entertain no doubt that the injunction will lie against an unincorporated labor union by the name (which is but the "collective name of all its members") when sued together with one or more of its members individually upon whom service may be had in their representative capacity, and that such injunction will be binding upon the body as an entity and against all its members, whether or not they be directly represented.

It follows, from what has been said, that the prayer for a perpetual injunction must be granted; and inasmuch as the question of "persuasion" has been made an issue, and as the evidence clearly shows that persuasion in this case

means and includes coercion and intimidation as defined by the authorities, the injunction order must be modified to include such persuasion, and may be, if necessary, redrafted to conform to this opinion in other respects.

Perpetual injunction ordered.

Charles F. Williams, for plaintiff.

Dempsey & Fridman and *Raymond Ratliff*, for defendants.

JACOB ANDERSON V. CINCINNATI TRACTION CO.

1. Upon a motion for a new trial, the facts are to be taken most strongly against the mover.
2. Where, in an action against a street railroad company for negligence whereby plaintiff's wagon, while traveling in defendant's track, was run into from behind by a car, it appears from the evidence that defendant's servants in charge of the car saw plaintiff's wagon in the track in ample time to have prevented the collision by the application of the ordinary means of stopping the car, the fact that the collision occurred raises a presumption of negligence on the part of the defendant.
3. In an action against a street railroad company for the negligence of its servants in charge of a car whereby plaintiff's wagon was run into behind, where the evidence shows that at the time plaintiff turned into the track, he was thirty to fifty feet ahead of the car; that the motorman saw the plaintiff turning into the track; that the car was traveling seven or eight miles an hour and plaintiff four or five; that a car going seven or eight miles an hour can be stopped by the ordinary appliances within thirty or forty feet, it is mathematically demonstrable that, by the exercise of ordinary care, the car could have been stopped or controlled in time to prevent a collision and a verdict in favor of the defendant should be set aside as not being supported by the evidence.

HOSEA, J.

Motion for new trial.

Upon a motion for a new trial—as upon a motion for non-suit—the facts are to be taken most strongly against the mover. This is the basis of the “scintilla” rule, and both rest upon the elementary doctrine that all things are presumed in favor of the correctness and regularity of judicial proceedings—*omnia praesumuntur rite esse acta, donec probetur in contrarium*.

The main outlines of conceded fact in this case are as follows:

The plaintiff, driving a spring wagon with a top and curtained sides, on a straight and practically level street, in full daylight, was run into from behind by a street car, his wagon dragged forward about fifty feet, overturned and smashed, his horse thrown down, and himself narrowly escaped with his life. Plaintiff's wagon was in full view and seen by those in charge of the car when seven hundred or more feet away, traveling between the track and the curb. There was also a milk wagon beyond plaintiff, coming toward him in the tracks. The milk wagon turned aside across plaintiff's path ahead and stopped at the curb. The distance from the outer rail of the track to the curb being only a trifle over eleven feet, plaintiff, in order to pass by the milk wagon, turned partially into the track, and while there, was struck by the street car.

To sustain the burden of proof on his part, plaintiff showed that before turning into the track, he looked back and no car was in sight; and that he was in the track a half minute before the collision occurred, and heard no signals. If this statement be true, and the car was traveling at only eight miles per hour (as claimed by defendant), then the car was about two hundred and forty feet behind plaintiff when he came upon the track; and, as it was shown that a car going at eight miles per hour can be stopped by the ordinary appliances in thirty or forty feet, the presumption of negligence was against the defendant, for it thus clearly appeared that there was ample time and opportunity to stop the car and avoid the collision.

The burden of overcoming the presumption being thus cast upon the defendant, the question—to put it most

strongly in its favor, and therefore assuming the position of plaintiff upon the track showed contributory negligence—was whether the defendant used proper care to avoid the accident?

The motorman and the conductor of the car both testified that the car was traveling at a speed of seven to eight miles per hour; that plaintiff's wagon was traveling at a speed of four or five miles per hour; that when plaintiff turned into the track, he was thirty to fifty feet ahead of the car; that the motorman instantly applied the reversing apparatus; that the car, its appliances and the track were in good order. The motorman also testified that a car going at eight miles an hour could be stopped within thirty to forty feet.

Taking from this testimony the factors most favorable to the defendant—car speed eight miles per hour; wagon speed four miles per hour—what distance must the car have traveled to overtake the wagon fifty feet ahead?

While the car was traversing the fifty feet, the wagon was traveling half as far, and when the car reached the spot where the wagon had been, the latter was still twenty-five feet ahead, and so on until—the speeds remaining constant—the car traveled to overtake the wagon about ninety-eight feet. If the initial distance apart be taken at only thirty feet, the car must have traveled about sixty feet to overtake the wagon—speeds being constant.

But the speeds were not constant. If the reverse was applied, as claimed, a reduction of car speed would immediately begin; and it is obvious that if reduced to one-half before actual contact, no contact could possibly occur. If a car traveling at eight miles per hour can be stopped in thirty to forty feet, its speed could certainly be reduced to four miles per hour in twenty to twenty-five feet; so that here was ample space and opportunity, not only to check the speed sufficiently to avoid collision, but to bring the car to a dead stop, if necessary, long before contact could possibly have occurred. If, as testified by the motorman of the car, Anderson's horse was trotting and was making six miles per hour, then the car must have traveled one hun-

dred and eight-four feet to overtake the wagon, starting at fifty feet apart.

Upon the facts claimed by the conductor and motorman of the car, therefore, it is demonstrable that the reverse gear could not have been applied when they testify it was applied, and when they admit should have been applied. But, in connection with further facts shown by defendant, it is clear, beyond a reasonable doubt, that it was not applied, if at all, until about the moment of the collision, or after.

(1) The conductor of the car says he knows when the reverse was applied, because the effect was so sudden that the weight of his body caused him to sway forward; and that this occurred when the car and wagon were thirty or forty feet apart.

Yet Hall, the cement man, a disinterested witness for the defendant, says that at this time he was standing on the rear platform of the car talking to the conductor of the car about other matters, and that the first thing that attracted his attention was the collision itself; and that he did not notice any indication of the reverse being put on. The testimony of McClure, the only other witness for defendant, tends to confirm Hall's version.

(2) Both conductor and motorman of the car agree that by and after the collision, the wagon was shoved or dragged from a point thirty feet short of the milk wagon to about twenty feet beyond it before the car came to a stop. Add these figures to those given before, and we have a minimum of one hundred and ten feet, and a maximum of two hundred and thirty-four feet, as the distance traversed by the car after the application of the reverse, as claimed, to the point of stoppage; and to these must be added, the length of the car, thirty feet.

The conclusion is irresistible, that the reverse, if applied at all, was not applied until about at the moment of the collision, and this means gross and culpable negligence on the part of the defendant.

A verdict so palpably against the evidence, can not be permitted to stand. The evidence is not sufficient to support the verdict, and the latter must be set aside.

Verdict set aside, and new trial ordered.

Aaron A. Ferris, for plaintiff.

Kittredge & Wilby, for defendant.

WILLIAM R. GARRISON V. C., H. & D. RY. CO. ET AL.

1. The rule of public policy declaring invalid contracts whereby an employer undertakes to exempt himself from liability to his employe for negligence, is not confined to cases where a railroad company is the employer, but extends to the relation of employer and employe generally.
2. A contract whereby an express company stipulates for immunity from its wrongful negligence, is within the inhibition of the rule that parties can not by contract take away the jurisdiction of the courts.

HOSEA, J.

Demurrer to second defense of United States Express Co.

To the petition setting up personal injuries received through the joint and co-operating negligence of both defendants, the United States Express Company avers, in its own behalf, as a second defense, that, at the time of entering into its employment, and as a condition and consideration of its so employing him, the plaintiff entered into a contract with the company agreeing to assume the risks for all expenses and injuries whether caused by negligence or otherwise, and to indemnify it against all claims for recovery on his own part, for injuries to him, and to pay over to it any sum which it might be compelled to pay in consequence of any such claim.

The demurrer filed to said defense as insufficient in law,

raises the question of the validity of such contract—whether an employer can, by contract with an employe, avoid his liability for injuries resulting from negligence in respect of duties required by law of the employer.

The pleadings here show that the contract was made and was to be performed in Ohio, and that the injury happened here. The question, therefore, is to be determined by the law of Ohio.

It is conceded that the case of *Railway v. Spangler*, 44 Ohio St., 471, 478, holding such contracts to be invalid, settles the law in Ohio as to contracts of railway employes, but it is contended that the rule and the public policy invoked, are confined to railway employment. In *Railway v. Spangler*, *supra*, the court, after commenting on *Little Miami Ry. v. Stevens*, 20 Ohio, 415, and *Clev., C. & C. Ry. v. Keary*, 3 Ohio St., 201, says:

“The doctrine established by these cases has remained unquestioned by this court for more than thirty years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting the greater diligence on the part of the brakemen and the consequent safety of passengers and merchandise in transit.

“* * * It is the firmly established policy of our law that such liability should attach. * * * The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private contract with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements.”

While it is true that the cases cited by the court are those of railway employes, yet from the language quoted it is fairly to be inferred that the court had in mind a principle

of broader application, and that the facts before it in this regard were significant only of the occasion of its application.

The principle is affirmed in later cases wherein contracts relating to membership in railway relief associations are distinguished and upheld; but the right of the employe to refuse to receive the benefits, and sue upon his common-law privilege, is made the criterion of validity. *P., C., C. & St. L. Ry. v. Cox*, 55 Ohio St., 497; *State v. Railway*, 68 Ohio St., 9, 36.

But the rule of public policy in question is not confined, in Ohio, to cases arising in railway employment. In a case involving the relations of a miner and the owner of the mine, reported in *Coal & Mining Co. v. Clay*, 51 Ohio St., 542, the court, on page 556, cites *Railway v. Spangler*, *supra*, in terms of a general, and not a limited, application to the relations of master and servant, quoting the same passage given above, and continuing as follows:

"If the principle in this" (the Spangler) "case has application to the one at bar, and no reason is perceived why it does not, it would seem to follow that the custom set up in the petition ought not to be held to have absolved the deceased from the obligation enjoined by the statute."

But again, in order that the principle should be rested upon a fixed and unmistakable foundation, as one of broad and general application, and that no misconception should arise from the accident of the more frequent occasion for its application in railway cases, our Supreme Court has declared its basis to be the Constitution of the state. In *Balt. & O. Ry. v. Stankard*, 56 Ohio St., 224, the court says, pages 231-2:

"A long line of decisions hold that parties can not by contract take away the jurisdiction of the courts in such cases. (Citing authorities.)

"While courts usually base their decisions upon the ground that parties can not, by contract, in advance oust the courts of their jurisdiction of actions, a more satisfactory ground is, that under our Constitution all courts are open, and every person, for an injury done him in his land,

goods, person, or reputation, shall have remedy by due course of law. Section 16, Article I.

"Courts are created by virtue of the Constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for any one, by contract or otherwise, to deprive himself of their protection. The right to appeal to the courts for the redress of wrongs, is one of those rights which is in its nature under our Constitution, inalienable, and can not be thrown off, or bargained away."

See also *Myers v. Jenkins*, 63 Ohio St., 101, 102, seventh syllabus.

The general rule that employers can not stipulate for immunity from their own wrongful negligence; and that a contract between employer and employe in consideration of employment and the compensation to be paid, whereby the employe assumes all risk from any cause while in service, and exempts the employer from liability therefor, is void, as against public policy, is sustained by many authorities elsewhere. *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App., 114; *Maney v. Railway*, 49 Ill. App., 105; *Louisville Bagging Co. v. Dolan*, 13 Ky. Law, 493; *Blanton v. Dold*, 109 Mo., 64 (18 S. W. Rep., 1149); *Runt v. Her-ring*, 2 Misc., 105 (21 N. Y. Supp., 244); *Bonner v. Bean*, 80 Tex., 152 (15 S. W. Rep., 798.)

The general principle declaring illegal contracts for rebates on shipments by common carriers, has been applied and enforced by the Supreme Court of the United States in *Union Pac. Ry. v. Goodridge*, 149 U. S., 680 (13 Sup. Ct. Rep., 970; 37 L. Ed., 896). The same is held in Ohio cases, where the statutory provisions on the subject are said to be but declaratory of the common law. In *Balt. & O. Ry. v. Coal Co.*, 61 Ohio St., 242, Judge Shauck, on page 252, quoting from an opinion by Justice Swayne, says:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the

objection would be tainted with the vice of the original contract, and void for the same reasons.' ”

It must be admitted that some federal courts, notably the Supreme Court of the United States, in the case of *Balt. & O. S. W. Ry. v. Voigt*, 176 U. S., 498 (20 Sup. Ct. Rep., 385; 44 L. Ed., 560), have adopted the view contended for by the defendant, sustaining contracts of this nature, except in railway cases, and limiting the rule of public policy strictly thereto, as an exception, based on the public interests involved, to the fundamental right of individuals to contract. But the question as it arises here, presents a subject-matter strictly within the general police powers of the state; and however unfortunate may be the conflict of opinion, the duty of the courts in Ohio is to accept and enforce the law of the state as declared by its own highest tribunal. It would not be seemly to suggest a criticism of the reasoning upon which the federal tribunals rest their determination; but it may not be improper to note that the broad right of contract is curbed in many directions which all courts concede as proper, in matters conserving mere property rights, while cases like the present, relate to the safety and even the life of the citizen.

For reasons given, the demurrer must be sustained and it is so ordered.

Demurrer sustained.

Robert S. Fulton, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

F. W. HULLINGER V. PEOPLE'S PUBLISHING CO.*

Where a contract of employment stipulated that plaintiff was to act as agent of defendants in a certain city, and was conditioned on the agent selling a certain amount of defendants' goods each month, and provided that, should the sales fall below the minimum for any month, if the sales should be sufficient for the succeeding months to bring the average up to the stipulated minimum amount, this was to be regarded as a ful-

*Affirmed by Supreme Court, 73 St. 363.

filment of the contract, with further stipulations as to the amount of plaintiff's salary and commissions, to be paid out of such sales, defendant also agreeing to maintain an office for plaintiff and furnish such things as were necessarily appurtenant to a branch agency; in such case the fact that plaintiff's sales fell below the minimum amount for the first month of his agency is no excuse nor justification for defendants' failure to perform their part of the contract.

HOSEA, J.; FERRIS and HOFFHEIMER, JJ., concur.

Error to special term.

In the view we take of the contract in this case, it will not be necessary to consider the questions involved in its proposed reformation. The contract as it exists furnishes sufficient ground for the action of the reviewing court.

We find that the contract is one of employment in which the defendants were to do and furnish certain things, and pay a monthly salary, in consideration of which plaintiff was to serve them as their general agent at Chicago for a period of a year. On each side the performance of certain stipulations was the condition precedent of performance by the other party. The defendants were to rent and fit up an office, provide stationery, blanks, etc., letters of credit, circulars, and books to be sold; and the plaintiff was to establish and superintend agencies, and sell the books at certain prices, making monthly reports and remittances to defendant, and was to receive as his compensation a salary payable monthly, and in addition thereto a commission upon sales made.

The controversy here arises principally upon the fifth and sixth clauses of the contract, which are as follows:

"(5) The success of the business depends upon a reasonable amount of books sold, and it is agreed and understood that the sales each month shall amount to \$250, which shall be considered the minimum amount of business necessary to a proper fulfillment of this contract. If the sales of any month should not amount to the minimum amount named above, and, during the succeeding months, sales should be in excess of said minimum amount, to make up an average

of \$250 per month, his contract is then fulfilled by the party of the second part.

"(6) It is mutually understood and agreed by the parties hereto, that the second party shall have the right and authority to collect all moneys for business done through said office. At the end of each month, after deducting from the receipts of said office the amount of his salary, necessary expenses, and commissions due him at that time, he shall remit the balance to the said first parties at their office in the city of Cincinnati.

"The parties of the first part will then replace stock sold during the previous month by party of the second part without charge or expense to said second party.

"In case the minimum amount of business required to be transacted shall not be sufficient to pay necessary expenses, commission, salary and cost of replacing stock sold, the deficiency shall be made good by said first parties at the end of each month."

The testimony shows that at the end of the first month the sales were not sufficient to cover the salary and rent of office; and the defendants failed and refused then and thereafter to make good the deficiency. The plaintiff, being practically at the mercy of defendants, endeavored for a time to keep the business moving at his own expense, but was unable to do so, and was finally dispossessed and the office effects and stock were sold by the landlord for rent.

The court below, although "considerably perplexed as to whether the defendants violated the contract in not paying the rent," resolved the doubt against the plaintiff upon a construction of the contract making the obligation of the defendants to pay rent, etc., conditional upon the minimum sale of \$250 per month by plaintiff; and therefore found that the plaintiff had failed to perform, and had no remedy.

As we read the contract, it permits of no such doubt. Taking clause 5 as an entirety, it is plain that the parties were establishing an average over the period of employment, and not a minimum applicable to each month considered separately and apart from every other. Not only is this evident from clause 5, but it is confirmed by the

deficiency stipulation in clause 6, providing that when the deficiency was so great as that the amount received was not sufficient to cover these necessary expenses, the defendants would nevertheless pay them.

The circumstances attending the making of this contract show that this arrangement was not unreasonable, nor do they imply any special liberality on the part of the defendants. The plaintiff was being employed as their agent, to establish their business in a city strange to him. To secure themselves against possible failure on his part, they required him to deposit with them \$800, which, in case of the faithful and successful completion of this contract to their satisfaction, was to be returned to him. They were thus indemnified to this extent against possible loss.

It was naturally to be expected that in taking up a new business at a strange place the first few months would show but meagre returns; and the provisions of the contract above quoted were manifestly drawn to cover this and other contingencies that might be expected to arise. There is nothing in the contract relative to the purpose of this deposit of money; and the claim in argument that it was to cover the value of books on hand is specious and rests upon nothing but a coincidence in amounts, which, if not purely accidental, may be regarded as evidence of an adroit design. The fact, however, the defendants required and obtained satisfactory references as to plaintiff's honesty before making the contract, sufficiently negatives the theory on which the argument is based.

Having this large amount of plaintiff's money in their hands, the defendants were perfectly safe in making a time-limited contract to pay plaintiff's salary and the rent monthly, to be taken out of the proceeds of sales, with an agreement to make good the deficiency, if any; because the plaintiff stood to lose his entire deposit unless his sales for the year should average \$250 per month. In other words, any deficiency payments would come out of his own deposit. As the sum deposited was sufficient to cover his salary for about six and one-half months, the defendants could well afford to take the risk of the minimum sale mark being

attained within that period by a man of high character and attainments, such as plaintiff is shown to be, under the stimulus of disaster to himself in case of failure.

In our view of the contract, the failure of the defendants to comply with their obligation to make good the deficiency at the expiration of the first and immediately succeeding months was a breach wholly indefensible, and renders them liable for the consequences thereof to the plaintiff. The judgment rendered by the court below must, therefore, be set aside and reversed, and it is so ordered.

Proceeding to render such judgment as should have been rendered by the court below, the finding and judgment of this court will be entered in behalf of plaintiff and against defendants upon the contract as set forth in the second cause of action; and the cause is remanded to the court at special term for an inquiry of damages by a jury, or by the court if the parties shall waive a jury.

Judgment at special term reversed; judgment for plaintiff upon the second cause of action, and cause remanded for inquiry of damages.

A. M. Warner, for plaintiff in error.

R. S. Fulton, for defendant in error.

SPAULDING & CO. V. EFFIE M. EVANS.

1. The jurisdiction of the courts in attachment proceedings depends upon a full compliance with all the steps prescribed by the statute; and where the ground for the attachment is the non-residence of defendant, the prime jurisdictional requisite is a valid levy upon property of the defendant within the territorial jurisdiction of the court.
2. Property attached must be appraised and returned as the property of the defendant, and if not so returned, and if it is not the property of defendant, it is fatal to the attachment.
3. The interest of defendant in different parcels of land attached must be appraised and returned separately, and the appraise-

ment and return must show what the interest of the defendant is.

4. Where the sheriff's return to a writ of attachment states that he levied upon the *interest* of the defendant in certain lands, and that he has caused the same to be appraised, but the inventory shows that he levied upon and appraised the *entire* land, and not an interest in it, the levy will be set aside.
5. The equitable interest in real estate of a purchaser who is in possession and has paid part of the purchase money, is not ordinarily subject to attachment.

HOSEA, J.

Spaulding & Company, an Illinois corporation, brings this action against Effie M. Evans, upon an account for merchandise of \$179.50 sold and delivered at Paris, France, between October 30, 1893, and January 12, 1896, inclusive, and claims interest from December 1, 1893.

The petition is filed November 27, 1903, and avers acknowledgment of the debt, and new promises within six years. An affidavit in attachment was filed therewith on the ground of non-residence, and on the same day an order of attachment issued to the sheriff of Hamilton county in the usual form. The order was returned same day by the sheriff, with the following endorsement:

"1903, November 27. No goods or chattels found to attach, and by virtue of this writ, I have this day attached in the presence of E. Wm. Oesper and John Hanson, two freeholders and residents of Hamilton county, Ohio, the interest of Effie M. Evans in the real estate contained and described in the schedule hereto attached, and same appraised by said freeholders under oath in the sum of \$7,500, and left a copy of this writ upon each of said premises.

"(Signed), SALMON JONES,

"*Sheriff of Hamilton County,*

"By J. E. CORMANY, *Deputy.*"

The inventory attached to the return shows an appraisement of "the following described real estate," to-wit, two distinct and widely separated lots of ground, at an aggre-

gate valuation of \$7,500, but without specific valuation of either.

The jurisdiction of the court, in actions of this nature, depends upon a full compliance with the steps prescribed by the statute. The defendant being a non-resident, the prime jurisdictional requisite is a valid levy upon property of the defendant within the territorial jurisdiction of the court. *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St., 543, 556.

The sheriff returns this writ as levied upon the *interest* of the defendant in certain lands, and that he has caused the same to be appraised; but the inventory shows that he has levied upon and appraised the entire land, and not an interest in it. This is fatal to the writ.

Moreover, the interest in each lot must be returned and appraised separately. Property attached must be appraised and returned as the property of the defendant. If it is not so returned, and if it be not the property of the defendant, it is fatal. *Pelton v. Platner*, 13 Ohio, 209; 219.

The appraisalment and return must show what the interest is. The statute authorizes attachment of lands and does not in terms authorize attachment of mere interests therein. An equitable interest of a purchaser in possession with part of the purchase money paid had been recognized as attachable. *Wright v. Bank*, 59 Ohio St., 80.

But *Coggshall v. Bank Co.*, 63 Ohio St., 88, 98, leaves the matter clouded, and the circuit court in *Warner v. York*, 25 O. C. C., 310, declares equitable interests in land not subject to attachment.

The attachment levy is set aside, and counsel is required to file with the court an affidavit (*Mayer v. Brooks*, 74 Ga., 526; *Waxelbaum v. Paschal*, 64 Ga., 275) showing the exact nature of the interest of the defendant, as a guide to the sheriff, and as the predicate of further proceedings, and the hearing is continued for this purpose.

W. C. Peirce and W. S. Kyle, for plaintiff.

E. P. Bradstreet, for defendant.

FIRE ASSOCIATION OF PHILADELPHIA *v.* HARRY APPEL,
ADMINISTRATOR.

1. If a stipulation in an insurance policy relating to incidental matters and not connected with the fundamental right of action becomes impossible as a result of causes not anticipated by the parties, the condition is discharged, and performance in that regard can not be required of the insured.
2. Where under a fire insurance policy containing a stipulation for an arbitration in case of a disagreement as to a loss, referees and an umpire were appointed, and after the appraisal was partially made, the referee of the insurer declined to act further, and the insurer refused to appoint another referee in his place, but insisted upon a new appraisal, such facts will operate as an abandonment on the part of the company of their right to an appraisal under the policy, and no objection, therefore, to the proof of loss as being unaccompanied by an award can be heard.

HOSEA, J.; HOFFHEIMER and LITTLEFORD, JJ., concur.

Error to special term.

This is one of a series of cases upon similar policies brought in the court below against various insurance companies, and by consent tried as one.

The Fire Association of Philadelphia, plaintiff in error herein, and defendant below, together with the other insurance companies similarly situated, issued their respective policies of insurance to defendant-in-error's decedent, insuring her against loss and damage to her stock of millinery, etc., located in a building occupied by her in Cincinnati, Ohio. All the policies were of the New York standard form.

A fire occurred in said building on September 9, 1901, and the assured and the companies entered into an adjustment of the loss. A difference arose and an appraisement was demanded by the companies under the terms of their policies and an agreement of submission duly entered into, and appraisers were duly selected by insurer and insured.

The appraisers selected an umpire and duly proceeded upon the determination of the sound value and loss under said submission, as provided in the policy; but after determining regularly as to about half of the stock (in value), the appraiser selected by the companies abandoned his duties and refused to resume, although requested to do so both by the plaintiff's decedent and the companies. There is no direct evidence of bad faith on the part of either appraisers or on the part of either of the companies or the assured, otherwise.

Upon the refusal of the appraiser selected by the insurers to continue to act, notice was given the companies and a request made of the companies to appoint another appraiser in his stead; but they insisted that they were entitled to an award under the original submission with both appraisers named in the same acting, or else to an entirely new appraisal with other appraisers to be selected by the parties. The assured declined to enter into a second submission.

Thereupon the appraiser for the assured and the umpire completed the estimate of the sound value and loss and returned same as an award, finding a sound value of \$11,491.97 and a loss of \$9,725.08.

Thereupon also the assured served "proofs of loss" on the companies, which were refused as not including a legal "award" by appraisers.

The insured having died, plaintiff, as her duly qualified administrator, brought suit upon the policies. His petition alleged performance of all the conditions of the policy "except such as were waived by this defendant as herein-after stated," followed by an allegation of the facts above stated, and claiming that the action of the appraiser selected by the companies in refusing to complete the appraisal was by instruction of the companies.

The defendants filed answer admitting the submission, the terms of the policy bearing on the same, the refusal of one of the appraisers to complete the appraisal, and denying generally the other allegations of the petition, and alleging breach of the appraisal clause.

The cases were tried under stipulation on these issues before Hon. Rufus B. Smith (a jury having been waived). Before a decision was rendered, Judge Smith retired from the bench and the cause was submitted to him as referee on the testimony taken before him while on the bench.

The referee reported findings of fact and law, to the latter of which the companies duly excepted, as also to his overruling the motions for a new trial. The report was duly confirmed at special term and judgments entered thereon against the defendants. The defendants filed motions to set aside these judgments and for a new trial, which were overruled and exceptions duly taken.

No exceptions being taken to the findings of fact, the errors alleged as the grounds of these proceedings are in the conclusions of law found by the referee and sustained by the court, as follows:

(a) That upon the refusal of the appraiser selected by the companies to complete the appraisal and the refusal of the companies to appoint another in his place to complete it, the companies abandoned their right to an appraisalment under the policy.

(b) That the appraisers selected by the assured and the umpire were justified in completing the appraisalment without the assistance of the appraiser selected by the companies as was done.

(c) That the companies were not entitled to a "new appraisalment," and therefore their objections to the proofs of loss were not well taken.

The legal difficulties created by the failure of the appraiser selected by the insurance companies to complete the work of appraisalment are resolvable upon elemental principles, as we think, by bringing into clear view at the outset the fact that the stipulation of the insurance contract here in question is one relating to a mere detail of proof as to the amount to be recovered and does not touch the fundamental right of recovery. Our highest judicial tribunal has declared that the constitutional right to appeal to the courts for a redress of wrongs is "inalienable and can not

be thrown off or bargained away." *Balt. & O. Ry. v. Stankard*, 56 Ohio St., 224; *Myers v. Jenkins*, 63 Ohio St., 101, 119.

This principle applies to stipulations of this nature in insurance contracts, which are upheld solely upon the ground that they prescribe only a mode of determining the loss and do not go to the right of action generally. *The Excelsior*, 123 U. S., 40, 49 (8 Sup. Ct. Rep., 33; 31 L. Ed., 75); *Hamilton v. Insurance Co.*, 6 O. F. D., 587 (136 U. S., 242, 255; 10 Sup. Ct. Rep., 945; 34 L. Ed., 419; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St., 258, 268.

In contracts involving stipulations of performance, it is important, in determining the facts under the rule of substantial performance, to consider whether those things in which the plaintiff may fall short of strict and literal performance are vital and affect fundamental rights, or are incidental matters as to which legal excuse for non-performance will suffice. If the failure is in respect of mere incidental things, the modern rule of laxity is applicable. *Kane v. Stone Co.*, 39 Ohio St., 1, 11.

Illustrations of this are not wanting in insurance cases. Thus it has been held that where the surrender of a policy is made a condition precedent of obtaining a paid-up policy, the fact that the original policy has been stolen or lost and can not be surrendered, will not defeat the right of the assured upon compliance with all the other conditions. *Wilcox v. Assurance Soc.*, 173 N. Y., 50 (65 N. E. Rep., 857; 90 Am. St. Rep., 579).

A similar holding as to the right to change a beneficiary, where the former beneficiary refused to deliver up the policy, will be found in *Lahey v. Lahey*, 174 N. Y., 146 (66 N. E. Rep., 670; 61 L. R. A., 791; 95 Am. St. Rep., 554).

The cases just cited apply to specified conditions of a contract the principle of discharge, by matter *in pais*, of a contract as an entirety, namely: That where performance is rendered impossible by events not fairly within the purview of the contract and that can not be assumed to have been within the contemplation of the parties, such event operates as a discharge. Page, Contracts, Section 1363;

Stewart v. Stone, 127 N. Y., 500 (28 N. E. Rep., 595; 14 L. R. A., 215).

In *Wilcox v. Assurance Soc.*, *supra*, the contention of the insurance company was: That the insured, though unable to produce the original policy, could have delivered a receipt or release which would "constitute a sufficient surrender of the policy." But the court said:

"The condition does not, in terms, require anything of that kind. What it does require is the surrender of the identical policy, with a proper receipt endorsed thereon. All agree that compliance with this condition became impossible," and the judgment of the lower court was therefore reversed and the cause retained.

This, as will be seen, is tantamount to saying that where a contract stipulation touching incidental matters and not connected with the fundamental right of action, becomes impossible by causes not anticipated by the parties, the condition is discharged, and becomes *non est*, and the insured is legally excused from performance in that regard.

The facts of the present case, under the contention of the companies that they acted in entire good faith in the selection of their appraiser and should not be bound by his default, seems to make the application of the principle above stated peculiarly appropriate and fitting. The provision for arbitration is one for the benefit of the companies, and was sought to be enforced by them. Appraisers were properly selected; these chose their umpire; and the appraising board duly organized proceeded in due form half way through their work. The stipulation of the policy made no provision for any other appraisement; and, having selected the appraisers in good faith, and these having duly organized, the power of the contracting parties in this regard was gone,—they were *functus officio*. The arbitrary withdrawal of an appraiser rendered that appraisement impossible, except by appointment of a new appraiser to act as a substitute. But this, although requested by the insured, was refused by the insurer.

Under some authorities a court would be justified in holding that a submission having been once entered into, it is

not in the power of one of the arbitrators to annul or avoid the agreement by deserting his trust (Morse, Arbitration, 156), and that, consequently, the award, as rendered by the two remaining appraisers, was a true and legal award and complied with the condition of the contract. But the better reasoning, we think, is that the appraisement contemplated by the contract having been rendered impossible by events beyond the control of either party, the condition of the contract in that regard was discharged.

For the reasons given and upon the authorities cited above, we prefer to rest our decision here upon the latter ground, noting, however, the refusal of the companies to accept a qualified performance by the insured party.

The referee held that the refusal of the insured to appoint a new appraiser to take the place of the one who abandoned his trust was, in effect, an abandonment of their right to an appraisement under the contract. We can not say that this is not a correct view, for it stands supported by good authority. A typical case of this character is that of *Bradshaw v. Insurance Co.*, 137 N. Y., 137 (32 N. E. Rep., 1055), cited by plaintiff in error, where, under a similar provision of the policy, an appraisement in due form was set aside upon the ground that the appraiser selected by the insurer showed, by his conduct, that he was biased and partial to an extent prejudicing the result. The court said that upon the evidence "a jury might say that he abandoned his duties as a disinterested appraiser." The reviewing court also upheld the trial court in refusing to charge that "the insurer was not bound by what its appraiser did or failed to do," because "the failure of defendant's appraiser to do his duty was not to be taken advantage of by the defendant."

The reasoning of the case seems to be grounded upon the maxim that a man shall not profit by his own wrong, and upon the theory that the appraiser is so far the representative of the party who selects him, as to involve a principle of responsibility analogous to agency. Such, in one form of expression or another, is the principle of many of the decisions on this question. *Uhrig v. Insurance Co.*, 101 N.

Y., 362 (4 N. E. Rep., 745); *Bishop v. Insurance Co.*, 130 N. Y., 488 (29 N. E. Rep., 844); *Brock v. Insurance Co.*, 102 Mich., 583 (61 N. W. Rep., 67; 26 L. R. A., 623; 47 Am. St. Rep., 562); *McCullough v. Insurance Co.*, 113 Mo., 606 (21 S. W. Rep., 207); *Read v. Insurance Co.*, 103 Iowa, 307 (72 N. W. Rep., 665; 64 Am. St. Rep., 180; *Niagara Ins. Co. v. Bishop*, 49 Ill. App., 388; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill., 9 (39 N. E. Rep., 1102; 45 Am. St. Rep., 105); *Fisher v. Insurance Co.*, 95 Me., 486 (50 Atl. Rep., 282; 85 Am. St. Rep., 428).

But that a second appraisalment can not be insisted on where the first fails through default of appraisers once properly selected is also held in many cases. See *Niagara Fire Ins. Co. v. Bishop*, *supra*; *Uhrig v. Insurance Co.*, *supra*; *Western Assur. Co. v. Decker*, 98 Fed. Rep., 381 (39 C. C. A., 383); *Fisher v. Insurance Co.*, *supra*; *Dun v. Insurance Co.*, 10 Dec., 667 (8 N. P., 612), affirmed by *Insurance Co. v. Dun*, 52 Ohio St., 639.

While in some of the cases the principle of localized responsibility seems to be more strongly suggested by a default aggravated by conduct, yet this can hardly be properly said to affect the question of agency. It would seem more logical to base the action of the courts in those cases upon the principle that where of two innocent persons one must suffer, it shall be he whose act or default brought into existence the conditions of and thus made possible the injury to the other.

But, the result being correct, whether the road to the right or to the left be taken in reaching it, is of secondary consequence, yet, except in cases where the act of the appraiser is such as to indicate culpable negligence in his selection, and thus justify a court in directly impugning the party concerned, it seems to us that the more satisfactory ground of decision is the discharge of the condition by unforeseen impossibility of performance. This view seems to be recognized with more or less distinctness in the following authorities in addition to those cited in the first instance: *Uhrig v. Insurance Co.*, *supra*; *Brock v. Insurance Co.*, *supra*; *McCullough v. Insurance Co.*, *supra*; *Pretz-*

Jelder v. Insurance Co., 116 N. C., 491 (21 S. E. Rep., 302); *Howard Ins. Co. v. Hocking*, 115 Pa. St., 415, 416 (8 Atl. Rep., 592); *Niagara Ins. Co. v. Bishop*, 49 Ill. App., 383, 396; *Western Assur. Co. v. Decker*, *supra*.

The objection to the proof of loss as being unaccompanied by an award, falls with the rest. The defendants repudiated the award as actually made, consequently theirs was but a reiterated demand for a new and independent appraisement, to which, as already shown, the contract did not entitle them. This would have been even more irregular, under the contract, than the substitution of a new appraiser under proceedings actually begun. To concede the principle of this demand would, as suggested by the referee, open a door to fraudulent repetitions, to the hardship and defeat of those insured. Under the basic principle we have adopted as controlling this case, no award was necessary, because the condition was rendered impossible of performance. The loss then became a fact to be proved like any other fact.

The plaintiff below seems to have proceeded in such wise as to be prepared to meet the issue under either of the theories we have indicated; but the insurance companies having refused to proceed under the appraisement originally begun, and having subsequently repudiated the award as made—all upon the claim that the proceedings did not fulfill the terms of the policy—could hardly admit in more cogent terms the impossibility of performance by plaintiff, and they had no right to require a compliance with a substituted demand.

Whether these acts be construed as a waiver or abandonment of the condition, or as admissions of the impossibility of performance, is immaterial, since both lead to the same result, namely: They relieve the insured party from the necessity of performance of that condition; and the general performance which in other respects is conceded, must be accepted as a substantial performance of the contract as a whole.

We do not find in *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St., 258, anything inconsistent with the view hereinbefore

expressed. In that case the insured ignored entirely the arbitration condition and refused, even when demanded by the insurer, to abide by it. The court very properly held that, since it was a condition of the policy, performance or a legal excuse for non-performance must be shown by the insured as a condition precedent to recovery, and that no legal excuse was shown.

There are, indeed, a few cases cited to us which hold that under certain circumstances it is incumbent on the insured to demand a new appointment of appraisers where the first arbitration fails, but those cases, when closely scanned, present some controlling fact such as the failure to select an umpire, etc., which clearly distinguish them as authorities. The clear weight of authority we find to be in favor of the general views we have stated; and the judgment of the court below is affirmed.

J. H. Cabell and J. L. Kohl, for plaintiff in error.

John R. Sayler, for defendant in error.

DAVID H. LEIBSCHUTZ v. L. C. BLACK ET AL., TRUSTEES.

1. The rights of the state, under its police power, to deal with the subject of unsafe buildings, is founded upon the principle that the safety of the people is the supreme law, and is superior to titles paramount derived through individual owners; and all contracts in relation to property uses are entered into in view of these existing rights of the state, and are subject to them. The rule *caveat emptor* applies.
2. The razing of a building by order of the police authorities of a municipality on account of its unsafe condition, is not an eviction or disturbance of the possession of the lessee by title paramount, and creates no liabilities against the landlord in the absence of a covenant broad enough to survive such action. A covenant, that lessee shall quietly have and enjoy the premises free from molestation from said lessor, is not such a covenant.
3. The order of the building inspector of a municipal corporation requiring the removal of a building on account of its dangerous

condition, and his action in refusing to issue a permit authorizing repairs with a view to preservation, are tantamount to a specific order to tear down the building, and is final, in the absence of steps taken by either lessor or lessee to obtain a review of such order by the board provided for such purpose.

4. Where a building has been ordered removed by the proper police officers of a municipal corporation on account of its unsafe condition, evidence that it would be practicable to make it reasonably safe by shoring and other repairs, is incompetent, except where fraud on the part of such officers is charged.

HOSEA, J.

Injunction to restrain dispossession.

Plaintiff is lessee, under an unexpired lease, of a store-room twenty by forty feet, fronting on the west side of Race street, above Sixth street, at the corner of an alley. The premises are part of a large building fronting about fifty feet on Sixth street, at the northwest corner of Race and Sixth, and extending northward ninety feet on Race to the alley. The entire building, although under one roof, is made up of several buildings, as originally constructed at different times, with an average life of about fifty years.

The lease to plaintiff, from the trustees of the Frank estate, was made on November —, 1903, for the "store-room, No. 607 Race street," for the "term of two years, three months and twenty days, ending February 28, 1906," at a monthly rental, (in the usual form of lease, commonly called the "short form"), and contains the following covenants:

"It is agreed that the lessees are to take the aforesaid premises as they now are and to make all improvements and repairs, etc.

"It is also agreed that if said lessees shall perform their obligations under this lease they shall quietly have and enjoy said premises during said term free from molestation from said lessors."

There is a further clause releasing the lessee from rent in case the premises are destroyed or rendered untenable by fire or other casualty.

On July 6, 1904, the trustees were served with a notice by the building inspector of the city of Cincinnati, setting forth that, as the building fronting fifty feet on Sixth street and extending back fifty feet, being quite old, and, by reason of extensive changes and alterations made at various times, had become very materially impaired in stability so as to warrant the belief that its failure was imminent, and that its structure and condition made it a "death trap" and "unfit for occupancy, and a menace to life and property," they were required to have the building vacated without unnecessary delay, and all weak and defective portions reconstructed, etc., and, if found impracticable to repair, to proceed with immediate removal; in default of which the inspector would proceed as the law directs and assess all costs against the property.

On August 9, 1904, the building inspector served upon the trustees, defendants, a substantially similar notice as to the building adjacent to that mentioned, on the north, fronting forty feet on Race, including plaintiff's store-room, stating that said building was unsafe and dangerous for reasons set forth, and that the condition of its walls would become hazardous "if disturbed through fire or the demolition of the buildings adjoining to the south;" and that "the whole structure would become unsafe and liable to collapse, should the adjoining buildings, of which they are a part, be razed, and would also have to be taken down."

The testimony of the building inspector on the stand in this case, confirms in greater fulness and detail his views and observations of the unsafe condition of the entire building, and his attitude of refusal to permit any attempts at repair or reconstruction other than by first razing the entire structure—considering the whole as one structure.

Testimony of architects was introduced to show that it would be practicable, by shoring and other repairs, to make the north building reasonably safe; but it does not seem to me that any such testimony can be considered except where fraud on the part of the inspector is charged.

As early as "Mouse's case," 12 Co., 63, the right to pull down a house to prevent spread of fire was sustained; and

the same thing is held in a case in 4 Term, 797, wherein Buller, Justice, bases this right on the ancient maxim, "*Salus populi est suprema lex.*"

In an early Massachusetts case, on the same subject, *Taylor v. Plymouth (Inhabitants)*, 49 Mass. (8 Metc.), 462, 465, the court says:

"If there be no necessity, then the individuals who do the act shall be responsible. This is the more reasonable, as the law has vested the authority in the proper officers, to judge of that necessity."

The municipal code of this state, adopted in 1902 (96 O. L., 23, Sec. 7, Par. 13), confers upon cities general power, "to provide for the removal and repair of insecure buildings." This power had long been exercised theretofore under special laws of the state, and ordinances of the city passed in pursuance of such laws.

The building inspector is appointed, and his powers defined under ordinance 218, passed August 15, 1898, but amended—as to Section 6, which is here in question—June 9, 1902.

Speaking generally, he is authorized to examine buildings thought to be insecure and give orders for their repair, etc., and it is made a penal offense for owners to fail to comply with his orders in the premises. He is also vested with authority to permit or refuse specific repairs.

In *Connors v. New York (Mayor)*, 11 Hun., 439, it is held that:

"The powers conferred on this department (bldgs., etc.) are in many respects judicial, and the machinery of the law is put summarily in motion where the dep't. acting under the laws, calls for its application." (Citing *Maximilian v. New York (Mayor)*, 62 N. Y., 160.)

In *Snarr v. Baldwin*, 11 Up. Can. Com. Pl., 353, there is a full discussion of the effect of the action of city authorities upon the contract relations of lessor and lessee. It is there held that the right of the city was not a title paramount in law, but a superior authority; that the covenant

for quiet enjoyment is simply indemnity against acts of particular persons, that is, those having lawful title before the covenant was entered into; and that the rule that a contract may be dissolved by superior authority so as to absolve a contractor from performance, applies in such cases.

The same principle is illustrated in a series of cases showing that when a performance of a condition of a contract becomes impossible by the operation and effect of a statute, and performance becomes thereby illegal, performance is excused. *Shellington v. Howland*, 53 N. Y., 371, 372.

In *Heine v. Meyer*, 61 N. Y., 171, it is held that when a contractor is stopped in the work of repairing a building by the building inspector, further performance is excused, but he may sue and recover for the work done, provided the defect is not of his making. And to the same effect are: *Jones v. Judd*, 4 N. Y. (4 Const.), 411; *Niblo v. Binsse*, 1 Keyes (N. Y.), 476.

In Ohio, the rule of "*caveat emptor*" is well established as applicable to the rights and obligations of the lessee.

In *Jones v. Roberts*, 1 Dec., 572 (32 Bull., 118), Judge Pugh, of the Franklin common pleas, cites *Bowe v. Hunking*, 135 Mass., 380, 386 (46 Am. Rep., 471), quotes the statement therefrom that "the law is unusually strict in exempting the landlord from liability for injuries arising from defects where there is no warranty and no actual deceit," and himself deduces the rule that the tenant assumes all risks of the premises being uninhabitable and unsafe, in the absence of a warranty in the contract.

In *Burdick v. Cheadle*, 26 Ohio St., 393, it is said, *passim*, p. 397: "There is no implied engagement or promise, on the part of a lessor, that the leased premises are in a safe condition." See, also, *Shinkle v. Birney*, 68 Ohio St., 328; *Burns v. Luckett*, 7 Dec., Re., 483 (3 Bull., 517).

In *Steeffel v. Rothschild*, 72 N. Y. Supp., 171 (64 App. Div., 293), it is held that a tenant takes possession under his lease "subject to the risk of being dispossessed through the condemnation of the leased building as unsafe and dangerous." This principle has its exceptions, very properly,

where the lessor purposely renders the building unsafe and procures the destruction of the building through condemnation proceedings, as in *Silber v. Larkin*, 94 Wis., 9 (68 N. W. Rep., 406).

Steefel v. Rothschild, *supra*, was a suit in damages, based upon deceit amounting to fraud in the lease contract, with reference to unsafe conditions, known to lessor but not to the lessee, nor discoverable by the latter in the exercise of ordinary diligence. It was first affirmed in 82 N. Y. Sup. and subsequently reversed on final hearing in 72 N. E. Rep., 112, holding the lessor liable as upon eviction under the rule that upon notice to take from jury, the evidence and all legitimate inferences therefrom are to be taken most strongly against the motion. The effect of the reversal therefor, simply establishes upon the facts of that case, the usual exception in case of fraud; and it may be said here as elsewhere that the exception proves the rule and the original statement stands as authority unaffected by the subsequent proceedings.

The principle, as above stated, is very fully covered in the case of *Conner v. Bernheimer*, 6 Daly 295, wherein it is held that the covenant of quiet enjoyment is necessarily entered into subject to the possibility of such a state of things (as illustrated in that case) occurring from the nature and condition of the premises devised, and the rights of adjoining owners. In the absence of a contract to repair or rebuild, the tenant takes the premises as they are; and if, in consequence of natural decay or the taking down of a building by an adjoining owner, it becomes indispensable as public duty for the public safety, to take down the building to prevent its falling down, there is no violation of the covenant for quiet enjoyment, which is nothing more than—to use the language of Mr. Taylor—that the lessee shall not be evicted nor disturbed by persons deriving title from the lessor by virtue of a title paramount.

The taking down of a building, as an act of necessity to prevent its falling down, either by the public authorities, or in obedience to their orders, is not an eviction or disturbance of the possession by title paramount, there being no

question of title involved in such act. The taking down and destruction of a building under such circumstances, has no more effect upon covenants in a lease than the destruction by fire, which does not produce the effect of eviction, unless the landlord has expressly covenanted to rebuild or keep in repair. Taylor, Landl. & Ten., Sections 305, 309.

The point is, that the right of the state under its police powers to deal with the subject of insecure buildings, founded, as Justice Buller truly says (4 Term, 797, *supra*), upon the principle that the safety of the people is the supreme law, is superior to titles paramount derived through individual owners; and consequently the contracts of parties in relation to property uses are entered into in view of these existing and superior rights of the state and are subject to them.

In the case at bar, the question is not complicated by stipulations often found in the covenant for quiet enjoyment, as exist in some of the cases cited by plaintiff's counsel. The plaintiffs here took the premises "as they were" and stipulated to make "all improvements and repairs;" and they were guaranteed quiet possession only as against molestation from the lessors.

The terms of the covenant were a material element, for example, in *Kansas Invest. Co. v. Carter*, 160 Mass., 421 (36 N. E. Rep., 63). The covenant in that case was against hindrance or interruption from "all persons whomsoever"; which covenant, says the court, "bound the lessors not to do any unnecessary thing" and, as the requirement of the authorities was in the alternative, it became a question of proof; and, as the lower court had found as a fact, that the building could be made safe without taking down, the right of election, it is said, was *limited by the nature of the covenant*.

It should also be borne in mind, that, in some of the states, statutes provide for a legal proceeding to determine the question whether repairs are practicable or removal is necessary. In such cases the action of the building inspector can not be final. (The ordinances of Cincinnati also provide an appeal by parties to a board consisting of the mayor, fire

marshal, etc., but in the case at bar no appeal was taken and the action of the building inspector thereby became final.)

Our law—whether wisely or not, is not in question—places the power of dealing with insecure buildings in the municipality which acts through its duly appointed officer. As already pointed out, his orders are enforceable by penal prosecution, and by his further power to dictate the method of procedure by refusing permits to repair, if in his opinion the building should be taken down. Unquestionably an abuse of these powers can be restrained by the courts; but in the proper exercise of his official functions he is supreme. As was said in *Cincinnati v. Moorman*, 11 Dec. Re., 162 (25 Bull., 126), "the building act * * * being enacted for the protection of life, it must be given a liberal construction, such as will effectually accomplish its purpose." *Sprigg v. Garrett Park (Town)*, 89 Md., 406 (43 Atl. Rep., 813, 815).

The rule plainly deducible from the cases cited, seems to me, on principle, to be this: that, with respect to the superior power of the state in relation to insecure buildings, the lessor and lessee stand on an equal footing. The law applies to both. The destruction by the order of the state through its officer, is not an eviction, and creates no liability on the part of the landlord in the absence of a covenant broad enough to survive such action. It is possible the views herein expressed might derive some support from R. S., 4113, but it does not seem to me necessary to refer to it. *Winton v. Cornish*, 5 Ohio, 477.

In the present case, the covenant is specifically limited, and falls far short of sustaining a demand on the part of the lessee. The orders of the building inspector and his refusal to issue permits for repairs with a view to preservation, are tantamount to a specific order to tear down the buildings and inasmuch as no steps were taken by either party to obtain a review of the order by the board provided for by the ordinance, the order was final, and practically put an end to the lease contract.

I have carefully examined all the authorities cited by plaintiff at the hearing, and find in them no support for

any other view as applied to the facts presented here. Judgment must be in favor of the defendants, and it is so ordered.

Suit dismissed with costs.

Samuel Wolfstein and Pogue & Pogue, for plaintiff.

L. C. Black, for defendants.

MARY S. KRAAY ET AL. V. JOHN GIBSON, TREASURER.

1. Money not in the possession of the owner can not be taxed as "personal property," under that term as defined by Revised Statutes, 2370, except when held by another as a *loan*, and the obligation to repay is secured by a mortgage or other conveyance, which, as between the parties, is regarded as a mortgage, *i. e.*, as security merely for the obligation to repay the loan. Conditional sales are not within the meaning of the definition, except such as by their terms could be, and by intention of the parties are in fact mortgages.
2. Parol evidence is admissible to show that a conveyance, absolute on its face, is, as between the parties, a mere security for a loan; but evidence to have such effect, must be clear, explicit, and unequivocal. Such evidence can be resorted to only where there is nothing in the conveyance to determine whether the transaction is a sale or a mortgage, and the nature of the transaction must be such as to be susceptible of either construction, in order that its real character can be so established. Where the provisions of the conveyance are inconsistent with the theory that a mortgage to secure an indebtedness was intended, it will be interpreted accordingly.
3. A privilege of repurchase, or a covenant for reconveyance, contained in a conveyance of real property, to be exercised at a *certain* time by the party in whose favor they exist, may, upon parol evidence of intention, be considered and treated in equity as defeasance provisions, and as characterizing the transaction as a mortgage. But this rule does not apply to a transaction involving a conveyance absolute on its face, with a perpetual lease back containing a privilege of purchase exercisable at the *unlimited* option of the lessee; hence, such transaction can not be treated as a mortgage by the taxing officers, and as

- such taxed as "personal property," under Revised Statute, 2730.
4. The right of a tax-payer to enjoin the collection of taxes wrongfully assessed against him, can not be taken away by any action of a taxing officer or board; the amount fixed may be conclusive, but where the foundation of the right to tax is challenged, their action is *prima facie* only.

HOSEA, J.

Injunction.

Suit is to restrain the treasurer of Hamilton county from collecting certain taxes, placed upon the tax duplicate for collection, upon certain moneys invested in real estate in the county in behalf of the estate of Salina Cadwallader, deceased, by Morris M. White, as trustee.

The transactions being all of a substantially similar character, it will suffice here to say that in each instance there is a warranty deed, absolute on its face, with consideration fully stated, and a perpetual lease back to the grantor containing a privilege of purchase, at the lessee's option, at the consideration stated in the deed.

The auditor, upon statutory proceedings taken in consequence of information given him by agents employed to look up tax omissions, found and certified to the treasurer for collection the following additions to the tax returns made by Mr. White:

YEAR.	AMOUNT ADDED.	TAX.
1898	\$116,500.....	\$2,947 45
1899	123,500.....	3,178 89
1900	82,500.....	2,143 35
1901	32,500.....	806 65
1902	32,500.....	753 35
1903	27,500.....	624 25

The amounts so certified included tax upon certain bonds, which has since been paid, reducing the taxable amount added in 1898 by \$17,000 and in 1899, by \$14,000.

It appears that, by will, Mrs. Salina Cadwallader left a residue of her estate to said M. M. White in trust, to pay the income thereof to children until the youngest should at-

tain the age of thirty, and then to divide the principal between them, with power to invest, reinvest and make deeds of real estate. Mr. White also, subsequently, became trustee for the children.

As such trustee, Mr. White, as he in substance testifies, invested the money in his hands, in the several properties in question, for income, because his *cestuis que trustent* never wanted the principal. He claims to have made no loan, and to have taken no security, but that he bought the property for the purpose of creating the ground rents, and that the entire transaction and all conditions are fully shown in the recorded deeds and leases.

The testimony of the other parties to these transactions, taken before the auditor, was substantially the same. Mr. Holland, for example, testified that he wanted to raise money on the property and put it in the shape of a ground rent so he would never have to pay it back if he did not want to, but could buy the property back after a certain number of years if he wanted to. The other parties gave evidence substantially of the same tenor.

The determination of the issues here rests, primarily, upon the construction to be given to the tax law of Ohio, in this behalf. The interest in lands created by the transactions in question, is claimed by plaintiff to be taxable as "personal property," by virtue of the provision of R. S., 2730, reading as follows:

"The term, 'personal property,' shall be held to mean and include * * * the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely."

The object of this definition is, undoubtedly, to bring within the purview of the tax laws that class of equitable mortgages created by acts of parties in the form of absolute conveyances, but with the purpose of pledging real property as security for the debt or obligation. It had long been held by courts of equity, that, whatever the form of the contract may be, if it is intended thereby to create a se-

curity for a debt or obligation, it is an equitable mortgage, and its quality is often implied from the nature of the transaction between the parties as against the written form. Jones, Mortgages, Par. 162.

But, in a sense, our statute, by the explicit character of its definition, imposes limitations, because it confines the inquiry to that which is the equivalent of a mortgage, *per se*.

In the first place, it must be money "loaned on pledge, or mortgage of real estate." A loan is defined as "that which is lent; anything furnished on condition of the future return of it, or of the delivery of an equivalent in kind; especially a sum of money lent at interest" (Century Dictionary). The legal definition embodies the more specific idea of a bailment or lending of something specifically to be returned at the determination of the bailment. Story, Bailments, Section 228.

The term "pledge" carries with it also the correlative idea of an obligation to return the thing lent. It is defined as a "bailment of personal property as a security for some debt or engagement" (Century Dictionary).

The meaning of the statute is therefore plain and unequivocal, as relating to money put out *as a loan* where real estate is pledged to secure its return, and, as between the parties, the same, although a deed in form is given, is considered by the parties as a security merely. Of course, any investment of money in land, in a very broad but not accurate sense, is a "security." A simple purchase of land may be for the specific purpose of security for the money, for land is generally regarded as the most secure form of money investment; yet the money is not taxed in such case as an investment upon a security. The word "merely," in connection with "security," emphasizes the explicitness of the meaning, as though its defining equivalents, "simply," "solely," "only" (Century Dictionary), had been used, and directs attention to the thing to be secured; namely, the obligation to pay back again.

It would seem therefore, as a necessary construction of the statute in question, that money not in possession of the owner can be taxed as personal property only when it is

held by another as a loan, and the obligation to repay is secured by mortgage or by a conveyance, that, as between the parties, is regarded as a mortgage in effect; *i. e.*, "as security merely," for the performance of the obligation to repay the loan. *Myers v. Seaberger*, 45 Ohio St., 232, 234.

The effect of the statute, in another aspect, is to legalize the established practice of courts of equity in permitting evidence of intention to prevail over the written contract in these cases; but it has been held, and wisely, that such evidence must be clear, explicit and unequivocal. *Brotherton v. Livingston*, 3 Watts & Serg., 334, 338; *Pearson v. Sharp*, 115 Pa. St., 254 (9 Atl. Rep., 38); *Wallace v. Johnstone*, 129 U. S., 58 (9 Sup. Ct. Rep., 243; 32 L. Ed., 619); *Carroll v. Tomlinson*, 192 Ill., 398 (61 N. E. Rep., 484; 85 Am. St. Rep., 344); *Bogh v. Gassert*, 149 U. S., 17 (13 Sup. Ct. Rep., 738; 37 L. Ed., 631); *Miller v. Stokely*, 5 Ohio St., 194, 195, 198; *Stall v. Cincinnati*, 16 Ohio St., 169, 170; *Mathews v. Leaman*, 24 Ohio St., 615, 624.

As was said in a well-considered opinion of the Supreme Court of Pennsylvania:

"Conceding that parol testimony may be admitted to show a deed absolute on its face to be a mortgage, yet the facts and circumstances relied on must not be of a doubtful import. It is not sufficient that they be merely consistent with the instrument being a mortgage; they must be clearly inconsistent with its being an absolute conveyance. Evidence less than this can not establish a parol defeasance. Titles regular and legal on their face can not be swept away by parol evidence of doubtful facts or ambiguous inferences." *Burger v. Dankel*, 100 Pa. St., 118.

In the case at bar, there was, in each instance, a deed absolute on its face, and a perpetual leasehold regranted to the vendor, with the privilege of purchase exercisable at his option. The question to be determined, is, whether the transactions thus represented, constituted—what they purport to be—conditional sales, or were, upon extraneous testimony as to the intent of parties, mortgages or securities merely, within the definition of our statute.

That a conditional sale is not a mortgage, is too well settled by authority to require comment; and it is a fair inference from the wording of our statute that the purpose of the explicit definition was to exclude conditional sales, except such as by their terms could be, and by intention of parties were in fact, mortgages.

It seems to be settled that parol testimony can be resorted to only where there is nothing on the face of the papers to determine whether the transaction is a conditional sale or a mortgage. *Jones, Mortgages, Par. 277.*

In other words, the nature of the transaction, as shown by the papers, must be such as to be susceptible of either construction, in order that its real character can be established by parol testimony; and it has been held that where the provisions of the contract are inconsistent with the idea that a mortgage to secure an indebtedness was intended, it will be interpreted accordingly. *Hanford v. Blessing*, 80 Ill., 188; *Smith v. Crosby*, 47 Wis., 160; *Hays v. Carr*, 83 Ind., 275; *Voss v. Eller*, 109 Ind., 260 (10 N. E. Rep., 74); *Yost v. Bank*, 66 Kan., 605 (72 Pac. Rep., 209; *Pumilia v. DeGeorge*, 74 S. W. Rep., 813 (Tex.).

The research into cases upon this subject leads into a labyrinth from which it is hard to emerge with a clear and satisfactory criterion by which the character of such transactions may be determined; and yet, after quite an extensive investigation of authorities, I am led back to the general view indicated above, in construing our own statute on the subject, as the true one.

In *Flagg v. Mann*, 2 Summ., 486 (9 Fed. Cas., 202), Justice Story lays down this rule:

"It has been said that the true test whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of money or not. I agree to that, indeed, in all cases, the true test is to ascertain whether the conveyance is a security for the performance or non-performance of an act or thing."

So, in *Brant v. Robertson*, 16 Mo., 129, it is said:

"In determining whether the transaction was a conditional sale or a mortgage, the first fact to be ascertained is, whether the relation of debtor and creditor existed previous to, or was created at the time of, the conveyance. It may be taken as universally true in law, that no conveyance can be a mortgage, unless it is made for the purpose of securing the payment of a debt, or the performance of a duty, * * *. If payment of money is the object of the security or conveyance, then there must exist a duty to pay the money. * * * When the form of the instrument is not conclusive either way, resort must be had to the circumstances attending the transaction."

See also, *Goodman v. Grierson*, 2 Ball & B., 274, in which the Lord Chancellor applies the rule of mutuality of remedies, and says:

"Why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limits agreed upon by the parties of the deed?"

That is to say: If, as a mortgagee, the vendor were to bring the property to a sale as under foreclosure, and it sold for less than the amount invested, he could have no remedy over for the residue, either upon covenant or the implied assumpsit. See, to same effect, *Bodwell v. Webster*, 30 Mass., 411.

In *Conway v. Alexander*, 11 U. S. (7 Cranch), 218 (3 L. Ed., 321), Chief Justice Marshall says:

"To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or policy of the law. * * * As a conditional sale, if really intended,

is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale." •

In two comparatively late cases, the Supreme Court of the United States has substantially reaffirmed these doctrines.

In *Wallace v. Johnstone*, 129 U. S., 58 (9 Sup. Ct. Rep., 243; 32 L. Ed., 619), it is held that a transaction similar to that at bar, but where a time is fixed for the repurchase, will not be held a mortgage unless it is clearly shown either by parol evidence or the attendant circumstances to have been intended by the parties as security for a loan or an existent debt. *Cadman v. Peter*, 118 U. S., 73 80 (6 Sup. Ct. Rep., 957; 30 L. Ed., 78); *Coyle v. Davis*, 116 U. S., 108 (6 Sup. Ct. Rep., 314; 29 L. Ed., 583); *Howland v. Blake*, 97 U. S., 624 (24 L. Ed., 1027); *Horbach v. Hill*, 112 U. S., 144 (5 Sup. Ct. Rep., 81; 28 L. Ed., 670).

The case of *Bogk v. Gassert*, 149 U. S., 17 (13 Sup. Ct. Rep., 738; 37 L. Ed., 631), presented as strong a case upon the facts as could well arise. There was a deed, and a time lease back, with privilege of repurchase in a given time. The privilege not having been exercised suit was brought to dispossess the tenant and a plea of title was interposed by Bogk, who introduced testimony showing that the transaction was intended as a mortgage; that plaintiff never had possession; that the negotiations were for a loan for the purpose of raising money to pay off mortgages, judgments, liens, etc., on the property; and showing also that the consideration and repurchase price was the amount loaned (\$15,000) with the interest compounded monthly for the term of the lease (aggregating \$17,935), and that the real value of the property was \$40,000 to \$50,000. The court says of it, in conclusion, page 30:

"All his evidence amounts to is that he wanted a loan of money, and that plaintiff insisted on a deed and an agreement to convey, instead of a mortgage. But defendant did not claim to have been imposed upon, deceived, or de-

frauded, and he had no right to a request (as to a charge) based upon this hypothesis."

A careful review of a large number of cases from many states seems fairly to establish the principle that where the transaction involves a privilege of purchase or bond for reconveyance to be availed of at a certain time, such may be, upon parol testimony of intention, considered and treated in equity as defeasance and give character to the transaction as a mortgage, and the equity of redemption may be enforced. But nowhere have I found an authority for such a holding upon a perpetual lease with privilege of purchase at lessee's option, unlimited in time:

The decided weight of authority is to the effect, tersely expressed in a recent case by the supreme court of Illinois: "A mortgage is a security for a debt or obligation and an incident thereto, and it is therefore held that a debt or obligation of some kind is an essential element in a mortgage," and because the bond in the case merely provided, that, if the plaintiff should pay a certain sum with interest and taxes, a reconveyance should be made, yet, because the bond created no liability enforceable at law and no debt or obligation to repay, the transaction was held to be a sale and not a mortgage. *Carroll v. Tomlinson*, 192 Ill., 398, 401 (61 N. E. Rep. 484; 85 Am. St. Rep., 344); *Bacon v. Bank*, 191 Ill., 205 (60 N. E. Rep., 846); *Burgett v. Osborne*, 172 Ill., 227 (50 N. E. Rep., 206).

The Ohio cases on this subject are of the same general character as those from other jurisdictions cited.

In *Miami Exporting Co. v. Bank*, Wright, 249, 252, the privilege of purchase was limited in time. The same conditions appear in *Marshall v. Stewart*, 17 Ohio, 356; in *Cotterell v. Long*, 20 Ohio, 464; in *Wilson v. Giddings*, 28 Ohio St., 554; and in *Patrick v. Littell*, 36 Ohio St., 79. In all these cases the circumstances left no doubt of the character of the transactions as being, and as intended to be, mortgages in fact.

But there are cases much more to the point. Thus, in *Miller v. Stokely*, 5 Ohio St., 194, 195, 198, a bill to estab-

lish a trust in the nature of a mortgage upon a deed absolute was dismissed upon the holding that proof such as to excite suspicion or even probability is not sufficient; and that proof in such cases must be "affirmative and so conclusive as to remove all reasonable and well founded doubts."

In *Slutz v. Desenberg*, 28 Ohio St., 371, 372, there was a contract to reconvey upon payment at a specified time; yet the circuit court is reversed, and the transaction held to be a sale and not a mortgage, upon a very full discussion, part of which is as follows, page 376:

"A mortgage, when in form a deed absolute, and a conditional sale are frequently so nearly allied to each other that it is sometimes difficult to say whether a particular transaction is the one or the other.

"The distinctive difference, however, appears to be this: The former is a security for a debt; the latter a purchase of land * * * accompanied by an agreement to resell at a given time for a given price."

The court cites *Goodman v. Grierson*, *supra*, with approval and quotes the principle that, "where no such liability"—that is, the remedy over against the grantor for deficiency—"accompanies the transaction, the deed covers a sale and not a mortgage."

The court also cites with approval the case of *Conway v. Alexander*, *supra*, and declares that the American rule is in harmony with the English rule on the subject, and further cites with approval the rule in *Robinson v. Cropsey*, 2 Edw. Ch., 138 Ch., 138, 144, as follows:

Where "the money advanced is not paid by way of loan so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, then it must be deemed purchase money and the transaction will be a sale upon condition." This case establishes the rule in Ohio as applicable to the case at bar.

Kemper v. Campbell, 44 Ohio St., 210, 214, was a cred-

itor's suit in which the right to claim a deed absolute to be a mortgage in fact, is held to be recognizable in equity only for the purpose of preventing imposition and injustice, and as a remedial right of redemption merely, and not of foreclosure.

The court holds, page 215, that, "There is a marked difference between an absolute deed held to be a mortgage and a deed that is intended to be, and is, a mortgage upon the face of it." Again the court says, page 219:

"The absence of a promise to pay and of a provision in the deed that upon payment the conveyance shall be void, marks the distinction between a proper mortgage and an absolute conveyance, with a right reserved to the grantor to claim a reconveyance upon the payment of money."

The cases cited complete the list of decisions of our Supreme Court that bear directly upon the subject, excepting, possibly, *Stratton v. Sabin*, 9 Ohio, 28 (34 Am. Dec., 418), to which reference will be made later.

McCammon v. Cooper, 69 Ohio St., 366, seems to still further emphasize the difference between a mortgage and a conditional sale transaction—the one bringing into existence an intangible subject of taxation called a "credit," the other producing a "ground rent," which the court classes as real estate. Indirectly, therefore, this case may be said to affirm *Slutz v. Desenberg*, *supra*, by showing, inferentially, that only the intermediate transactions involving a *time lease* are capable of equitable transformation according to intent of parties.

In view of the principles established by the authorities cited, which are selected from many because of the clear statement of principle, *Slutz v. Desenberg*, *supra*, is decisive of this case.

In this connection it is not without significance that no case upon a perpetual leasehold with privilege of purchase at the unlimited option of the lessee has ever reached the Supreme Court of this state, and that no such case appears among the large number of others examined in the preparation of this opinion. This fact can only mean that the principle is regarded by the bar generally as beyond

question. [I have not overlooked the case of *Coleman v. Miller*, 8 Dec. Re., 179 (6 Bull., 199), decided by our old District court in 1881; but, for aught that appears in the text of the decision, the lease in question may be a time lease. Moreover, the facts found show, that both parties, at the date of the transaction, distinctly regarded it as a mere loan upon security of the land. In view of the late utterances of our own Supreme Court, courts of other states and of the Supreme Court of the United States, I can not accept it as an authority for the purposes of this case.]

The case at bar, in other words, does not fall within the debatable class, as to which extrinsic testimony is admissible. Its character is fixed by its own terms. *Jones, Mortgages*, Section 261; *Stratton v. Sabin*, 9 Ohio, 28, 31 (34 Am. Dec., 418), in which case the court cite with approval the following holding in the case of *Glover v. Payne*, 19 Wend., 518:

"The mere fact of a conveyance of land, and an agreement for a reconveyance at a future day, at an advanced price, at the election of the grantor, afforded no evidence of an intention that the deed should be a mortgage, though the question might have arisen, had the deed been given for a pre-existing debt, or on a loan of money, or had the grantor entered into an obligation to repay the consideration money expressed in the deed."

The case, *Glover v. Payn*, *supra*, page 521, is a well-considered authority in support of the proposition that, "where there is no debt and no loan, * * * an agreement to resell will not change an absolute conveyance into a mortgage." See also, *Kunkle v. Wolfersberger*, 6 Watts, 126.

It may be frankly admitted that there was on one side in the transactions under consideration, money seeking investment, and on the other, a necessity for the use of money. Yet it was quite within the right of parties to agree upon such terms as they might choose, whereby one should give and the other receive. There was, in effect, an exchange of the land for the money, coupled with a right or option in the grantor to change back again if he should desire, or not

to do so if he should not see fit. Certainly there was no obligation created, and both parties fully understood and acquiesced in these terms. Should the land depreciate in value, the loss would fall upon the vendee, who had no means of enforcing any claim against the vendor, for he had given his money upon an exchange which created neither debt nor obligation on which a claim could be based. The few chance expressions that might seem inconsistent, elicited from the parties, many years after the events, by an adroit and aggressive cross-examination—expressions used in a loose, popular and inaccurate sense—do not change the essential weight of the testimony as a whole. The answer to the claims of counsel in this behalf is found, by analogy, in *Bank v. Slemmons*, 34 Ohio St., 142.

“If a payee take from the maker a promissory note, and at the same time surrender the maker’s note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan.”

Such proof, even if it might raise a suspicion, like the coincidence of the amount of rent with a given interest on the sums paid, can not convert into a mortgage a transaction which on its face bears no such suggestion, much less one that by its inherent nature in law is not convertible. Indeed, taking all possible extrinsic facts into view, they do not present so strong a case as *Bogk v. Gassert, supra*, which the Supreme Court of the United States, upon a full citation of authorities, declared to be a sale, and not a mortgage, even in the face of inadequacy of consideration, and a time limit upon the privilege of repurchase.

If the conclusions reached are correct, it also disposes of the claim arising from the increase or decrease of rentals and partial payments of purchase money in certain of the cases, for I apprehend that the familiar principle of equity, “once a mortgage, always a mortgage,” would apply to a conditional sale (*Jones, Mortgages*, Sections 263, 269). It is true that parties may, by subsequent agreement so to do,

completely change the character of the transactions; but if the transactions in this case were conditional sales, it is because they lacked the vital elements of a mortgage at their inception and consequently no change in details, short of supplying the missing links, so to speak, could change their legal character.

The statements of the text-books summarizing the authorities on this subject are not always accurate, as will appear from the citation by counsel from 1 Cooley, Taxation, to the precise point under discussion. The citation is the broad statement from the third edition on page 768, as follows:

"Where, however, under the revenue laws land is taxable and also a mortgage upon it, if one from whom money is obtained, instead of taking a mortgage for the amount, takes an absolute conveyance and gives back a lease with a stipulation to sell back the land on repayment of the money and interest,—the whole transaction being obviously only a loan and the taking of security therefor,—the land may still be taxed to the borrower and the lender taxed as mortgagee," citing *Waller v. Jaeger*, 39 Iowa, 228; *Lap-pin v. Nemaha Co.*, 6 Kan., 403; *Patrick v. Littell*, 36 Ohio St., 79.

But, the cases cited by Judge Cooley—and they can be hardly considered as leading cases on the subject—were obvious cases upon their facts, and in each there was a privilege of purchase within a specified period. If the terms of this statement, "repayment of the money and interest," be taken literally, it converts the broad statement into a limited one, and, in view of the expression, "instead of a mortgage," which immediately precedes, this is probably what is meant, viz., a loan of money to be repaid at a specified time with interest.

That this is what is meant, and no more, is fairly to be inferred; because, a little earlier in the same connection, he declares that the intention of the party, even were his purpose to avoid taxation, is not in all cases the governing factor, citing as instances, investments in government securities, and the change of personalty into real estate with

a lease for years back, in order to avoid taxation. He says of these:

"In each of these cases the party is only exercising a right which the law allows to him."

The case of *Hess v. Muir*, 65 Md., 586 (5 Atl. Rep., 540; 6 Atl. Rep., 673), cited as a "bottle case," will be found to turn upon a wholly different point; namely, that of a fraudulent attempt to cover usury, which vitiates a contract under the law. But even here, the court says *passim*:

"It is plainly shown that the money was obtained as a loan and that the deed and lease were but means of security for the amount agreed to be repaid."

With reference to the legal effect of the action and finding of the auditor in these cases, it may be remarked, briefly, that where the amount, only, is in question, it may be conclusive, but where the foundation of the right to tax is challenged, the action of the auditor is *prima facie*, only.

Full jurisdiction exists in this court. It is unquestionable that the right of the tax-payer to enjoin collection can not be taken away by any action of a taxing officer or board. *Gager v. Prout*, 48 Ohio St., 89; *Hagerty v. Huddleston*, 60 Ohio St., 149, 165, 167; *Musser v. Adair*, 55 Ohio St., 466, 471.

The injunction prayed for should be granted, and it is so ordered. Judgment for plaintiff, and perpetual injunction ordered.

C. B. Wilby, for plaintiff.

A. B. Benedict, for defendant.

MARY E. SPELLER, ADMX., v. CHRISTIAN MOERLEIN BREW.
CO. ET AL.

1. An employer is bound to use only ordinary care with respect to furnishing appliances for the use of his servants, and this duty requires in the inspection and selection thereof, only the application of the ordinary known tests, and not the employment of experts or the use of the most scientific methods.
2. The fact that a work car used in a manufacturing business was in construction practically a railroad "gondola" car, and that the brakes thereon would not answer to the tests required of railroad cars of equal tonnage is not sufficient to charge the owner thereof with negligence in permitting its use by his servants under conditions not involving the same or similar demands of use; it is therefore erroneous to admit expert testimony as to railway freight train standards and opinions based thereon, they being, under the circumstances of the case, wholly inapplicable and misleading.
3. In an action for damages, for a personal injury caused by a defective brake chain on a work car, testimony as to the general inadequacy of the chain is incompetent where it appears from the evidence that the accident in question resulted from the breaking of an imperfect welding of a link in the chain.
4. In an action for personal injuries resulting from the breaking of a defective brake chain on a work car, where plaintiff's evidence—including the *res ipsa loquitur* of the link itself as an exhibit—show that the defect had been open and visible for some time prior to the accident, and therefore of a nature discoverable by inspection, which it was decedent's duty to make, an instruction to the jury to find for defendant was not erroneous.
5. The liability of the breaking of a link in a brake chain containing a latent defect is a risk assumed by an employee, and the master is not chargeable in damages therefor.

HOSEA, J., FERRIS, J., and LITTLEFORD, J., concur.

Error to special term.

The action below was to recover damages for the death of plaintiff's decedent, caused by alleged negligence of defendants in failing to furnish the decedent with proper and safe appliances to operate a certain car, and also fail-

ure of duty in respect of the proper construction of said car and its machinery, which defects were unknown to the decedent.

The petition alleges a contract between one Fred L. Emmert and the Christian Moerlein Brewing Company, joint defendants, for the disposal of "brewer's grain," in the carrying out of which contract a car was operated upon the premises of the brewing company, upon a track from the brew house into a terminal shed; and that the decedent was employed to operate said car; that it was the duty of defendants to furnish safe appliances and construction, and that they wholly failed to do so, or to inspect same; and that its defects were unknown to decedent. Further, that while decedent was at his accustomed work upon said car and while applying the brake of said car to check its speed, and, without fault on his part, the brake mechanism broke and gave way, and decedent was crushed, by the car coming into close proximity to the roof timbers of the shed, and killed.

The co-defendant, Emmert, first denying the allegations of the petition, further says that the decedent was and had been in his employ as foreman for about nineteen years, and for ten years last past as foreman of the work of moving malt to the shed referred to, with the duty to inspect and keep in order all appliances used in said work, and especially said car and appliances, and to report all defects and needed repairs; and to handle, operate and keep the car in good order; and that he relied upon him for said inspection and careful conduct of the work in question, and he had no knowledge of or reason to suspect any insufficiency or defect of the car, brake, or other appliances.

The brewing company admits the employment of decedent by Emmert and repeats, substantially, the allegations of his answer above set forth as its own. It also alleges that the death of decedent was caused by his failure to stop the car at the proper place, and denies any fault or negligence on its own part.

The reply of plaintiff puts in issue the allegations of these answers.

Upon trial of the cause to a jury, in the court below, at the conclusion of plaintiff's testimony, the court, on motion of defendants, instructed the jury to bring in a verdict for defendants, which was accordingly done; and this action, together with alleged errors of the court in the admission of testimony, constitute the basis of the proceeding in this court to set aside the verdict and reverse the judgment thereon.

The testimony introduced by plaintiff shows that the decedent, Speller, was in the employ of Emmert, an independent contractor engaged in the removal and disposition of the spent malt or "brewer's grain" produced by the brewing company. The appliances used for this purpose were a track about three hundred feet long, laid upon the premises of the company, and a car, substantially in the form of an ordinary railway "gondola" car operated thereon—all belonging to the brewing company and used by Emmert.

The track, at the brew house end, was upon a short incline on which the car stood, secured by blocks under the wheels, while receiving its load. From the foot of the short incline the track continued upon a very slight descending grade to an unloading shed, where the rails were turned sharply upwards as a terminal "bumper" to bar further progress of the car.

The operating force of the car was gravity solely. Upon knocking away the wheel blocks, the car obtained an initial start sufficient to continue it in motion over the much slighter grade to its destination, under the regulating control of an ordinary hand-brake operated by the attendant in charge. The empty car was drawn back to the starting-point by a rope passed over a windlass at the upper end of the track.

The decedent was the foreman in charge of the men and appliances used in transporting the grain, and his duty was to inspect appliances, report defects and repairs needed, and to personally operate the car; and had been for nine years engaged in this work. The testimony of bystanders as to the circumstances of the accident showed that the de-

cedent had allowed the heavily loaded car to attain considerable headway until, about seventy-five feet from the terminus of the track, he attempted to check the speed, when the chain pulled apart, thus rendering the brake useless. The cause of the parting of the chain was clearly shown to be a defective welding of the terminal surfaces of the iron constituting one of the links, allowing the link to open and the chain to part; but considerable expert testimony was introduced tending to show, by comparison of standards used in the construction of freight cars for ordinary railway service, that the brake chain used upon this car, being made of three-eighths iron,—that is, links made of iron rod three-eighths of an inch in diameter,—was structurally inadequate.

Upon the motion for a new trial, in the court below, it was argued, as also at the hearing in this court, that the car, being to all intents a railway car, the three-eighths chain, being of lighter material than was proper according to ordinary railway standards, was therefore inadequate; and that this was a defect of construction unknown to the decedent and not discoverable by him in the exercise of ordinary care, because the defect was apparent only by applying scientific principles beyond the knowledge of the ordinary workman, but which the master should have known or could have ascertained by employment of scientific experts and tests.

This argument, however, is fallacious and involves an untenable legal theory. An employer is only bound to use ordinary care with respect to such matters, and his duty requires only the application of ordinary tests. He is not bound to employ experts or use the highest tests. *Clyde v. Railway*, 65 Fed. Rep., 482.

Moreover, the theory of inadequacy urged by counsel rests upon a wholly immaterial fabric of expert testimony constituting a false premise of the logical syllogism. The conditions and standards of ordinary railway traffic afford no proper basis for expert opinion on the subject.

It is common knowledge, and therefore judicially cognizable, that, in the operation of commercial railways, the

grades, curves, variable speeds, frequency and suddenness of stops, and the interaction of cars *en train*, etc., subject the structure of a car and the equipment as a whole and in detail to very great stresses. The construction throughout must necessarily, therefore, possess great strength and resisting power capable of responding to sudden and great emergencies.

In the case in hand, however, the sole function of the brake equipment was that of a mere regulator of a slow and practically uniform speed upon a very slight grade and for a very limited distance. Here all the conditions of operation were fixed and invariable and no contingencies were to be anticipated or provided for so long as the car was properly operated. It is reasonably manifest that a mere fraction of the brake-chain strength required for ordinary railway use would suffice here, since the entire function of the brake was to maintain a comparatively slight and uniform pressure upon the wheels to slightly retard the motion of the car against the action of gravity. Consequently all the expert testimony as to railway freight standards and opinions based thereon, were wholly inapplicable and misleading and should have been excluded from the case.

The court below having the same questions before it, upon the motion for new trial, as are presented in the argument in this court, resolved them upon the grounds: (1) That the claim of inadequacy of the chain had no basis, because the testimony showed that the accident was not attributable to that cause, but to a specific defect, namely, an imperfect welding of a link of the chain; (2) that the plaintiff's evidence, including the *res ipsa loquitur* of the link itself as an exhibit, showed that the defect had been open and visible for some time prior to the accident and, therefore, of a nature discoverable by inspection which it was decedent's duty to make; and (3), that if the defect was in fact latent and not discoverable by ordinary care it fell within the class of assumed risks; and that in either aspect the defendants would not be liable.

The opinion of the court below, citing authorities, is re-

ported in *Speller v. Brewing Co.*, 16 Dec., 281; and with the views there expressed we are in entire accord.

The cases of *Columbus & H. Ry. v. Webb*, 12 Ohio St., 475, and *Pennsylvania Co. v. McCurdy*, 66 Ohio St., 118 (63 N. E. Rep., 585), cited in the opinion below are a very full and complete exposition of the law on the points stated, and govern this case. What we have said above but affords additional support to the correctness, in our view, of the court's action in directing a verdict; and as, upon the whole record, we find no error prejudicial to plaintiff, the judgment must be affirmed, and it is so ordered.

Arnold Speiser and *Theodore Horstman*, for plaintiff in error.

E. W. Strong, for defendant in error.

THE GERMANIA FIRE INSURANCE CO. v. LOUISE WERNER.

A condition in a policy of fire insurance that it should be effective only "while the premises were occupied as a store and dwelling" is a mere condition subsequent; hence in an action on such policy, it was not erroneous, in the absence of fraud, to submit to the jury the question of whether a change in the use of a building and its subsequent nonoccupancy increased the risk of fire, nor to charge that if they found in the negative, the plaintiff policy holder would be entitled to a recovery. *Moody v. Insurance Co.* 52 Ohio St. 12, followed.

HOFFHEIMER, J.; FERRIS, J., and LITTLEFORD, J., concur.

Error to special term.

The action below was to recover the amount alleged to be due on a certain policy of insurance, issued by the Germania Fire Insurance Company, plaintiff in error, to one Stephan, insuring him against loss or damage by fire, from noon of May 26, 1900, until noon of May 26, 1903. The policy covered the property of said Stephan, located at 1525

Vine street, in the city of Cincinnati, "while occupied as a store and dwelling."

On September 13, 1902, Stephan sold his premises covered by said policy, to Louise Werner, the plaintiff below and defendant in error herein, assigning to her the policy aforesaid, which assignment and defendant insurance company's consent thereto were duly indorsed upon the policy. At the time of the assignment the premises were occupied as a saloon and dwelling, the change in the nature of the occupancy having been made without the knowledge or consent of defendant insurance company, who it seems was not advised of same until after a fire occurred on May 15, 1903. At the time of the fire and for a period of ten days prior thereto, the premises it seems were unoccupied and without the knowledge of the insurance company. Due notice of the fire and proofs of loss were filed within the required time. The company, however, refused payment, and accordingly suit was entered. The plaintiff below pleaded generally the performance of all conditions precedent and asked judgment for the amount set forth in the policy.

The defendant by answer admitted that it had entered into a contract of insurance with the plaintiff, and that the policy issued by it covered the premises only "while the premises were occupied as a store and dwelling."

Defendant also set up that the premises were not occupied as a store and dwelling at the time of the fire and also that they were wholly unoccupied. The plaintiff by reply denied generally all of the allegations of defendant's answer. The verdict was for the plaintiff below for the full amount of the policy and in due course judgment was rendered thereon. These proceedings are to reverse said judgment.

The errors complained of grow out of the view taken by the trial court of the issues made by the pleadings, the nature of which we have already adverted to. The alleged errors growing out of the giving of the plaintiff's special charge, and the refusal of the court to give defendant's special charge and the alleged error in the general charge

—all duly excepted to—depend for their determination upon the question, whether the court below was correct in presenting to the jury for their consideration in the manner in which he did, the issues made by the pleadings.

The theory upon which the court below proceeded, was that the clauses above referred to were conditions subsequent; that if the change from a store and dwelling to a saloon increased the risk, and if non-occupancy increased the risk, then they were available defenses, and if sustained by the testimony, there could be no recovery on the policy, and the court placed upon the defendant insurance company, the burden of proving that the change in the nature of the occupancy or non-occupancy increased the risk. In other words, the court practically held that these pleadings presented two questions: (1) Did the change from a store and dwelling increase the risk? (2) Did the non-occupancy of the building increase the risk? And the jury were further instructed that if they found that there was a change in the nature of the occupancy, or if they found that there was non-occupancy, and that the risk was not thereby increased, that the plaintiff would thereby be entitled to a verdict. Was this action of the court proper?

There was no question of fraud in this case, and it appeared that the contract of insurance was made after the enactment of Rev. Stat., 3643, otherwise known as the Howland valued policy law. Upon reading the record it will be seen that the testimony tended to show that the policy insured the premises of plaintiff below against fire loss, while same was occupied as a store and dwelling; that when same was issued the premises were occupied as a store and dwelling; that at the time of the fire they were not occupied as a store and dwelling, and that for ten days prior to and including the day of the fire, no one lived in said premises, although it seems, in the part of the premises that had formerly been devoted to a saloon, there were certain bar fixtures. It likewise appeared that the insurance company assented to the assignment of the policy, but there is no assent on the part of the company in writing, as to any change in the character of the occupancy.

In fact, there seems to have been no assent as to any change of occupancy whatever, on the part of the insurance company. Such being the nature of the evidence, it will be seen that the court below followed out the doctrine enunciated in *Moody v. Insurance Co.*, 52 Ohio St., 12 (38 N. E. Rep., 1011; 26 L. R. A., 313; 49 Am. St. Rep., 699), the third syllabus of which is as follows:

"When the action is upon such a policy, issued since the passage of the act of March 5, 1879, 'to regulate contracts of insurance on buildings and structures' (Rev. Stat., Secs. 3643, 3644), and there has been no intentional fraud on the part of the insured, an answer which alleges the breach of a condition that the insurer shall not be liable 'for loss or damage in or on vacant or unoccupied buildings unless consent to such vacancy or non-occupancy indorsed' on the policy, is insufficient unless it is also averred that the risk was thereby increased; and if the allegations of the answer be put in issue, whether the building insured became vacant, or unoccupied, or the risk was increased, are questions for the jury, upon both of which the defendant has the burden of proof."

So that in *Moody v. Insurance Co.*, *supra*, we find that the question of vacancy was squarely before the court, and having found vacancy, the court read into the contract of insurance and made it a part thereof, the aforesaid Rev. Stat., 3643, and it placed the burden on the insurance company to show, not only the vacancy, but also increase of hazard. That is practically what the court did in the case at bar.

If the doctrine of this case is applicable to "vacancy," then by parity of reasoning it applies to mere change in the nature of the occupancy as well, in the absence of intentional fraud.

Now we are aware of the seeming conflict that exists on the questions here involved, even in our own courts. *Insurance Co. v. Wells*, 42 Ohio St., 519, seems to hold to the contrary. The fact that Judge McIlvaine did not call attention to Rev. Stat., 3643, is pointed out by Scribner, J.,

in *People's Mut. Fire Ins. Co. v. Bowersox*, 3 Circ. Dec., 218 (5 R., 444).

Judge Laubie, in *Dwelling House Ins. Co. v. Webster*, 4 Circ. Dec., 704 (7 R., 511), argues that the question of vacancy must have been before the court in *Insurance Co. v. Wells*, *supra*, because of the citation of *Sleeper v. Insurance Co.*, 56 N. H., 401, where Smith, J., who wrote the opinion, considers the effect of a statute of that state on a "vacancy" clause. And in *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St., 230 (62 N. E. Rep., 338; 56 L. R. A., 159), Judge Shauck in a dissenting opinion, Judge Davis concurring, points out that the doctrine of *Moody v. Insurance Co. supra*, has not been approved.

Whether therefore the doctrine of *Moody v. Insurance Co.*, *supra*, shall be upheld, is a question that our supreme Court alone can determine. The court below followed the later expression of the Supreme Court (see also *Milwaukee Mechanics' Ins. Co. v. Russell*, *supra*, pages 256, 260; *Eureka Fire & M. Ins. Co. v. Baldwin*, 62 Ohio St., 368, 381, 382 (57 N. E. Rep., 57), and we think that we are similarly bound.

The theory, therefore, upon which the cause was submitted was correct under *Moody v. Insurance Co.*, *supra*, and as the question of increase of hazards was fairly put to the jury and negatively answered necessarily under the verdict, and as there was sufficient testimony to warrant the finding, we are of opinion that there was no prejudicial error herein and the judgment must be affirmed.

J. H. Cabell and J. L. Kohl, for plaintiff.

.. Geo. W. Hengst and L. M. Mongan, for defendant.

GERMANIA INS. CO. *v.* WERNER.

CHARGE TO JURY.

Now, Gentlemen of the Jury, the case goes to you.

First, let me remark that this is a suit simply upon a contract. A policy of insurance is simply a written contract; a contract to indemnify, or make good, a loss which might occur through fire, or through causes enumerated in the contract, to the owner. So that there is nothing especial about an insurance policy over any other written contract, so far as the main points here will be concerned. It is simply a contract, in substance, that upon the payment of the proper consideration in money, in case loss to the building insured occurs, through fire or other causes enumerated in the policy, that loss will be made good to the owner, if it occurred within a certain period of time which the contract covers.

It being a written contract, we must look to the contract itself to ascertain just what its terms are.

The plaintiff, Mrs. Werner, comes into court and says that this policy of insurance, or this contract of insurance, was made by her predecessor in the title of the property, named Joseph Stephan, with this company—the Germania Fire Insurance Company, a corporation under the laws of the state of New York, but doing business in Ohio, and having an office in Cincinnati; that her predecessor, Stephan, made this contract of insurance, insuring this building for a sum not exceeding \$1,000, for the term of three years from the 26th day of May, 1900, at noon,—which would carry it to noon on the 26th day of May, 1903; that this policy provided, that, by the consent of the company endorsed thereon, the same might be assigned or transferred to another person who may acquire any interest in or title to the property. She avers that it was transferred, by the consent of the company endorsed on the back of the policy. We find the consent duly endorsed and signed by

Mr. Finke, the manager, and no question is raised about that. She then says that, on the 15th day of May, 1903—this policy, you will observe, expiring on the 26th day of May, 1903, consequently the 15th was within the three years—that, without any fault on her part, the building was partly destroyed by fire, and the damage thereto was more than the sum insured, namely, \$1,000; and that she immediately gave notice of the fire to the defendant, and submitted her proof loss within the proper time; and that the defendant has failed and refused to make any payment to her on account of said loss. And she also says, generally, that she has performed, on her part, all the conditions incumbent upon her to be performed (reading)—“has fully performed all the conditions to be performed on his part under said contract.”

The defendant company admits all these general facts, and sets up certain defenses, some of which involve questions of law, and some of which involve questions of fact. The issues of fact to be determined by you here arise upon the defenses number 3 and 5 in this answer. “For a third defense”—this the defense No. 3—“for a third defense to plaintiff’s petition,” and so on, and avers that the policy contains the following provision: “This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if any change take place * * * in the interest, title or possession of the subject of insurance” (the subject of insurance being the dwelling-house, or, rather, described her as a 3 1-3 story frame building, with metal and shingle roof and its additions, etc.)—“this policy * * * shall be void if any change takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) * * * by voluntary act of the insured, or otherwise.” And the defendant avers that, by the voluntary act of the assured, there was a change in the possession of said premises, in that, to-wit, said premises, while occupied or in the possession of the tenant occupying the same, was occupied, not as a “store and dwelling-house,” but as a “saloon,” from January 3,

1903, and a long time prior thereto, until April 18, 1903, and such change of possession was without knowledge or consent of the defendant, and that, therefore, the hazard of loss or damage by fire was increased, and said policy became void and was void at the time of the fire alleged in the petition.

And also this defense:

"For a fifth defense defendant adopts all the allegations of the first defense as fully as though set forth at length herein.

"Further answering, defendant avers that said policy contained the following provision: 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the building described herein * * * be or become vacant or unoccupied and so remain for ten days.'" Defendant avers that, without the knowledge or consent of said defendant, the said building became vacant or unoccupied on or about the 18th day of April, 1903, and was from that day continuously unoccupied until a long time after May 15, 1903, the day that said fire is alleged to have occurred; that, by the said non-occupancy of said premises, there was an increase in the risk, and that by the terms of said policy it became and was entirely void at the time of the fire alleged in the petition.

Now, gentlemen of the jury, this contract, or policy,—I don't intend to read it all to you, but merely call your attention to certain features of it, because the contract will be with you in the jury-room,—sets forth that, in consideration of the stipulations herein named and of twenty dollars premium, this Germania Company does insure Joseph Stephan for the term of three years from the 26th day of May, 1900, at noon, to the 26th day of May, 1903, at noon, against all direct loss or damage by fire, except as herein-after provided, to an amount not exceeding one thousand dollars, to the following described property, while located and contained as described herein, and not elsewhere, to-wit:—and then the description follows, that is, a 3 1-3 story

frame building, etc., while occupied as a store and dwelling, being No. 1525 Vine street.

Then, among the stipulations which follow, are certain stipulations which avoid the policy—which render it null and void in case certain things happen—namely, if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance connected with it.

Now come the stipulations upon which defendant relies: “The entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if any change take place in the title, interest or possession of the subject of insurance (except change of occupants without increase of the hazard);” and, second, “if the building shall become vacant or unoccupied and so remain for ten days.”

At the time this policy was entered into, there was a certain law of the state of Ohio, commonly known as Section 3643 of the Revised Statutes, which provides as follows: “That any person, company, or association, hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and so forth, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy shall be paid, or in case of partial loss, the full amount of the partial loss shall be paid.”

This law being a law regulating contracts of this nature, and being in existence at the time that this policy was made, must be read into the policy as a part of it, consequently it affects all of these stipulations. This statute became part of the contract of insurance, and controls the construction and operation of this contract.

The condition of the policy with regard to the occupancy of the building, that is, as to the particular use made of it,

or as regards its being occupied or being vacant—these provisions are, therefore, so qualified by the statute that, in the absence of intentional fraud on the part of the insured—and there is no evidence in this case of that kind—or change from one occupancy to another—that is, from one kind of occupancy to another—that is to say, its occupancy as a store, and its occupancy as a saloon—or its change from being occupied to the condition of being unoccupied, in order to be available as a defense, it must appear that the risk, by these changes, was thereby increased.

Now, it is a well-settled fact that a risk is not *necessarily* increased by these changes, and therefore, when the insurer—that is, the company—pleads such facts as a defense, it must also prove as a fact that these changes—if changes are shown to have occurred, such as defendant pleads—they must also show that those changes did, in fact, increase the risk; and that is a question of fact for you to determine, under the evidence in the case.

The burden of proof is upon the defendant to show that the risk was increased. It is admitted, in this case, that the occupancy was changed from a store and dwelling to a saloon and dwelling, and that at the time of the fire the building was unoccupied. The facts for you to determine will be, whether it was unoccupied for the ten days specified under this policy; and if it was unoccupied ten days, or more, then whether that unoccupancy increased the risk.

No doubt, of course, under certain circumstances, the vacation or disuse of an insured building may, in some cases, materially increase the risk; in others it may not increase it at all. The circumstances may be such, in some cases, that the risk is no greater, and it may possibly be even less than it was before. But whether it is increased, or not, in any case, must depend upon the situation and the surroundings and the conditions as shown to you in the testimony.

Now, a question of that nature, where there is any dispute, or where there is any conflict of testimony, or where the testimony varies on one side and the other, wherever there is a dispute of any kind, in other words,—is for you to determine, upon a preponderance of the testimony. And

by the preponderance, the law simply uses the figure of a balance; one side or the other preponderates according to the weight. And you are to determine it by a preponderance of the testimony, considering not simply the number of witnesses on the one side or the other, but upon the character of the testimony given by the witness; remembering that it is a question to be determined by the circumstances of the case. The fact of a change of occupancy—the fact of the building remaining unoccupied—alone, does not determine the question. You must consider that fact, however, together with the circumstances, the situation, the surroundings, and all the evidence which you get from the witnesses, which will throw light upon a particular fact as it may exist in this case, and determine it by the preponderance, or the proportionate weight of the testimony; the testimony which, to your mind, is the more persuasive.

Witnesses sometimes state things which may be valuable and helpful to you, or otherwise, according to their means of knowledge, according to their judgment, according to the accuracy of their observation, according to the facts and circumstances which they take into account in making their opinion. Remember that the opinion of witnesses upon a point of this kind is merely to aid you. But it is your own judgment, at last, that must determine, under your oaths. You are not to be governed exclusively by the opinions of witnesses, but receive them, consider them, and, so far as they aid you in reaching a judgment, accept them. But you are not to surrender your own judgment; for it is to you that this case is submitted; not to the witnesses who come upon the stand.

So, gentlemen of the jury, the facts, for the practical purposes, or issues, in this case, are brought down to a comparatively narrow point: Was there a change of occupancy? As a matter of fact, it seems to be admitted that there *was* a change of occupancy. The building was originally occupied as a store and dwelling, and subsequently leased for purposes of a saloon and dwelling. Then, the question is, under the circumstances of this case and upon the testimony

as you have heard it, according to the preponderance of the testimony: Was there an increase of risk thereby? If there was not, that defense goes for nothing. If there was, that defense is perfectly good. Either one of these defenses, if you and them to be sustained, that there was an increase of risk, under the statute would be a complete defense in the case.

The same with respect to the matter of vacancy.

(To counsel): Is there any point that I have not touched upon, that counsel think should be covered by the charge?

MR. KOHL: I think of nothing, Your Honor.

THE COURT: Then, gentlemen, the case will pass into your hands for a determination of these two points.

I only desire to say, by way of recapitulation and in addition thereto: You and I are here as parts of the great machine of justice. Your part is just as important, just as high; and, if possible, more vitally important even than the functions of the court. But we both have our duties to perform, and we both have sworn to perform them impartially and fairly, for the purpose of doing justice between parties, and to do that without fear, favor or affection. It makes no difference that one of these parties is a corporation and the other is an individual. It is not a case of sentiment. It is simply a case for application of principles of law on one side, and principles of common sense on the other, to the facts as they appear before you. And I charge you and caution you to give the case careful consideration; determine it according to your best judgment, upon the testimony as you have heard it and upon the law of the case as I have laid it down to you, and as it is plain under the statute, and render your verdict accordingly.

There are two forms of verdict here. Your first duty, by the way, will be to select a foreman, and, according as you render your verdict, in behalf of the plaintiff, or the defendant, your foreman, for you, will sign one or the other of these blanks.

If you find for the plaintiff, as there is no question about the amount of the loss, your verdict will be for the amount of the policy, which is shown in this case, and it is not

disputed that the actual loss was greater, but the policy goes only to the extent of a thousand dollars; and the damages, then, would be—if you find for the plaintiff—a thousand dollars, under the terms of the policy, and interest on the amount of the loss will begin sixty days after the date of the furnishing of proofs—which will be sixty days after June 1st—to the first Monday in May, this month. The damage will be, then, a thousand dollars with interest from sixty days after the 1st of June up to the first Monday in May.

If you find for the defendant, you will simply so find, and return the appropriate blank.

Gentlemen of the jury, you will please retire and consider your verdict.

EFFIE J. RYAN *v.* THE CINCINNATI TRACTION CO. AND
THE CITY OF CINCINNATI.

1. In a suit for damages against two or more persons on the ground of negligence, the petition is demurrable for misjoinder, unless it appear that the tort complained of was a joint tort.
2. There is an improper joinder of actions where the element of negligence relates to entirely distinct and independent conditions not in themselves connected.

HOSEA, J.

Heard on demurrer to petition: (1) Misjoinder of defendants; (2 and 3) Improper joinder of causes of action; (4) Deficiency of facts sufficient, etc.

The facts alleged are, in brief, that plaintiff was injured in alighting from a car by stepping into a hole in the street pavement; and charges negligence against the traction company in maintaining an insufficient step on the car from which to alight, and in stopping the car at an improper place to alight; and against the city for failing to keep the street pavement in proper condition; whereby the injury

is claimed to have resulted from the combined negligence of both.

The petition seems to me to be demurrable in principle, unless governed by counter authority (to which I will advert later), for the reasons clearly set forth in the case of *Morris v. Woodburn*, 57 O. St., 330, wherein the court says:

"But while the tort of the city consisted in the failure to discharge a duty imposed by statute, that alleged against Mrs. Morris consisted in the creation of a nuisance dangerous to those using the walk. These are concurrent and related torts, but they are not joint. In view of their independent character, the plaintiff might, at her election, maintain her action either against the city for its omission of duty, or against Mrs. Morris for the creation of the nuisance which caused the injury."

In the case cited the nuisance consisted in a defective grating over a cellar-vault in a public pavement in front of Mrs. Morris' premises; and the negligence of the city consisted in suffering the pavement to remain in a dangerous condition caused by such defect of which it had knowledge.

The element of negligence, therefore, related to the same physical fact; whereas, in the case at bar, it relates to entirely distinct and independent conditions not in themselves connected. In the cited case demurrers for misjoinder were nevertheless sustained in the court below; and the court above sustained this action and supplied the reasons given.

The principle is well settled that the several acts of different people will not authorize their joinder as defendants even where they result in one injury. It is only a *joint* act, or a joint negligence in respect of the same act, that will justify joinder; and this I understand to be the rule deducible from the case of *Street Railway Co. v. Murray, Administrator, et al.*, in 53 O. St., 570, based upon a death resulting from collision between a railway train and a street car crossing the railway tracks, in which case the

Supreme Court pass without objection the following charge to the jury:

"Both railroad and street railway might be found guilty of the wrongful act causing the injury, if both were concurrent in point of time and fact, and the wrongful act of each was the direct and proximate cause of the injury."

In the case just cited, however, the question of misjoinder was nowhere raised by the parties, and, therefore, must be regarded as waived. In view of the very explicit ruling in the case first above cited, which is later in date, the earlier one can not be regarded as binding authority upon the direct question. Moreover, in the case of a collision, there is but one physical fact to deal with; and it may be fairly said that both parties contributed jointly and directly to the injury by their positive acts.

The case of *Howard v. Union Traction Company*, 179 Penn., 391 (1900), is on all fours with the case at bar in its facts. There the plaintiff was injured by alighting from a street car at a place where the gas company had placed a block of wood over a recently filled trench, and the court says:

"An averment that the conductor directed plaintiff to get off the car at a dangerous place does not, in connection with the allegation of negligence against the gas company, show a united negligent act in any sense.

"There was no community of fault by the two defendants in the act which occasioned the injury, and neither defendant had the least participation in or control over the negligent act of the other."

To the same general effect is 87 Cal., 430, *Miller v. Ditch Company*, wherein it is held that while a joint injunction will lie to prevent the continuance of a common wrong, yet a claim for damage can not be enforced against the parties jointly, because there was no concurrent negligence. The distinction made was that existing between equitable and legal remedies.

The case of *Gutridge v. Vannatta et al.*, 27 O. St., 366, cited against the demurrer, holds that where a sufficient

case is stated against one party the "case is not spoiled"—to use the language of the commission—"by joining other parties against whom no cause of action exists." Judgment of dismissal should not have followed the sustaining of a demurrer for misjoinder, as was done by the court below. The demurrer was manifestly improper, because there was not a misjoinder of parties against whom causes of action existed, but no cause of action at all against one of the parties joined. The defect might, perhaps, have been reached by motion to dismiss the superfluous party.

I am satisfied that the demurrer here is well taken upon the first, second and third grounds.

Demurrer sustained.

Thomas B. Paxton, Jr., and George H. Warrington, for the demurrer.

Michie & Green, contra.

S. P. KINEON v. WM. C. ROGERS.

1. Inasmuch as the assignment of a contract divests the assignee of all interest in or control over it, an allegation that he has failed and refused to permit the assignor to carry it out, is demurrable.
2. The doctrine of part performance can not be invoked to take a verbal contract out of the statute of frauds, where the action is for breach of the contract, and the remedy is purely legal—for damages in money.

HOSEA, J.

Demurrer to amended petition.

The petition alleges that the defendant, Rogers, verbally contracted with the Cincinnati Street Railway Company to furnish them coal for a period of five years from about July 26, 1896; that Rogers assigned his right to the Kineon

Coal Company in consideration of five cents per ton, payable upon the coal furnished; that the Kineon Coal Company did furnish the coal required, for the first year, and paid Rogers his tonnage; but that thereafter Rogers "*failed and refused to permit*" the Kineon Coal Company to deliver coal "*although during all of said years said Rogers had said contract for coal*"; and that "*by reason of the failure of said Rogers to carry out said contract on his part*" the Kineon Coal Company was damaged in the sum of \$75,000; and said company has assigned its rights to plaintiff. By amendment it appears that the assignment of Rogers to plaintiff was verbal; and the demurrer is taken to the amended petition for insufficiency of facts, based on the statute of frauds.

The inconsistent and contradictory statements of the petition render its meaning somewhat uncertain. Taking its allegations literally, it is manifest that the "assignment" of the contract divested Rogers of all interest in or control over it; and consequently his "permission" was not necessary to enable the Kineon Coal Company to fulfill the contract to which it was a party by substitution by virtue of the assignment. The "failure" or "refusal" of Rogers to "permit" the Kineon Company to fulfill its contract with the other party involves a *non sequitur* and can not form a predicate for action.

But, again, if it is meant—as seems a probable inference—that Rogers, not being a coal dealer, placed an independent contract with the Kineon Coal Company to furnish him the coal required to enable him to carry out his contract with the street railway company, and that this is the contract sued upon, and was verbal, then the action is barred by the statute of frauds.

The statute in this regard—Revised Statutes, Section 4199, re-enacting the ancient English statute, in substance—provides that no action shall be brought upon any agreement not to be performed within one year from the making thereof, unless said contract is in writing, etc.

The amended petition recognizes the force of the statute

and alleges the deliveries of coal during the first year as a part performance.

But the doctrine of part performance as a ground for taking a case out of the statute is a purely equitable one, confined to suits of an equitable nature where specific performance of contract is the remedy sought, and where, under the circumstances shown in the cause, it would be a fraud upon the plaintiff for the defendant not to perform on his part. The act of part performance, with the knowledge and for the benefit of the defendant, being such as to work hardship upon a plaintiff who shows good faith, are laid hold of in a forum whose jurisdiction is *in personam*, as a basis for enforcing the plaintiff's equitable right through the medium of estoppel against the defendant, who is not permitted to claim the benefit of the statute.

But it is manifest that this doctrine can have no application in an action at law, such as the present one, where there is neither occasion nor opportunity for its exercise. The very essence and foundation of equity procedure is the inadequacy of the legal remedy; whereas the present action is a purely legal one—for breach of contract; and the remedy sought is purely legal—for damages in money.

These principles are familiar and elementary; and will be found fully set forth and established in Story's Equity, par. 761; *Watson v. Erb*, 33 O. St., 35; *Kling, Admr., v. Bordner*, 65 O. St., 86 (103), and many others.

Upon either aspect of the petition the demurrer must be sustained and it is so ordered.

Demurrer sustained.

Louis A. Ireton and W. M. Schoenle, for demurrer.
Horstman & Horstman, contra.

THE SECURITY INSURANCE COMPANY v. HARRY MICHAEL
ET AE., A FIRM, ETC.

1. Where a petition has as its object the bringing under judicial inquiry fraudulent acts rendering void an award or finding regular on its face, and to annul and set aside the award is a vital condition with reference to legal rights depending upon it, a case for equitable jurisdiction is clearly presented.
2. If the effect of an award, if valid, is to fix a basis upon which several parties are to be made contributors, they are all parties in interest in the relief sought, and the same reasons which justify the joining of any two of them as plaintiffs require the joining of all.
3. Under the practice code the coming-in by cross-petition of some of the parties in interest consenting to the action is not a proper joinder, and a demurrer to the petition on that ground will be sustained, with leave to redraft the petition and include the cross-petitioners as plaintiffs.

HOSEA, J.

Heard on demurrers to petition and cross-petition.

Suit is by two of six insurance companies (the other four being made defendants) against the defendant firm, seeking to set aside an appraisal award or finding of the amount of loss, alleged to be incorrect, excessive and unjust through and by reason of fraudulent acts and fraudulent misrepresentations of the insured in and during the appraisal proceedings, which acts and misrepresentations are claimed to render the policies void.

It appears, inferentially at least, that the award was upon a joint submission in that behalf by all the companies concerned; and the four companies (or three of them) appear, represented by counsel for plaintiffs, and file cross-petitions, following, *in totidem verbis*, the averments of the petition and asking independently the same relief.

The petition is demurred to for (1) want of jurisdiction as to subject-matter; (2) misjoinder of parties plaintiff; (3) same, as to defendants; and (4) want of facts sufficient,

etc.; and the cross-petitions are also demurred to.

If, as I apprehend, the grounds stated all involve as a fundamental proposition the objection to the jurisdiction of equity in the premises, I think the demurrer is not well taken. It is fairly clear from the petition that the object is to bring under judicial inquiry fraudulent acts rendering voidable an award or finding regular on its face; and to invoke powers peculiar to equity—should the facts be found as alleged—to annul and set aside this award which is a vital condition as to legal rights depending upon it. In such a case the equitable jurisdiction of the court is clear beyond question and the demurrer as to the first ground must be overruled.

But it also appears that the award is the result of the joint and concurrent act of all the insurers; and its effect, if valid, is to fix a basis upon which all are to be made contributors, in proportion, to make good a common loss. All are therefore parties in interest, by virtue of this joint relationship to the award, in the relief sought to be obtained, namely, the annulment of the award as a condition of their liability. The same reasons that justify the joining of two as plaintiffs require the joining of all.

As the demurrer is said to search the record, it is sustainable upon the ground of defect of parties plaintiff, rather than misjoinder. Section 5005 of the practice code requires parties joined in interest to be plaintiffs, except where they refuse to join, in which event, upon proper allegations, they may be made defendants (Section 5007). But this was not done. The status here clearly shows that the cross-petitioners in fact consent and should be joint plaintiffs in the petition. As cross-petitioners they are not properly in the case and the cross-petitions are subject to be stricken from the files, but are not open to demurrer since it is not, properly speaking, a misjoinder as to them, not being real defendants.

For the reasons given the demurrers will be sustained in part, as to the petition, and overruled in part, with leave to amend petition in — days, and overruled as to cross-petitions. But as the situation requires a redrafting of the

petition including the cross-petitioners as plaintiffs, it is suggested that a more complete, succinct and exact averment of facts is desirable, showing more clearly the grounds of joint equitable relief and an appropriate prayer that the court may take cognizance of the matter and determine it as an entirety according to the facts as they may be found upon final hearing, the plaintiffs submitting themselves to the jurisdiction for this purpose upon the theory that a court of equity having taken jurisdiction for one purpose will retain the cause and administer full relief in the premises.

Demurrer sustained with leave to amend in ——— days.

Cabell & Kohl, for insurance company.

Conner, Walker & Sparrow, for Michael et al.

CATHERINE M. BRIGEL v. E. W. KITTREDGE ET AL.

Per Curiam.

Upon due consideration of all matters brought to our attention upon the rehearing, we see no reason to change the views heretofore expressed in setting aside the sale made by the receiver herein. Other creditors than those more immediately connected with the property sold, have interests to be protected, and we think that in a case of this nature, if the trustee in bankruptcy neglects or refuses to take proper action, a court of equity has full power to recognize the action of creditors on their own behalf, and give it effect (*Saxton v. Sieberling*, 48 O St., 555, 560).

This the court will more readily do when the injustice complained of involves irregularity in its own proceedings, or that of its officers, as well as of judgment creditors and their representatives.

Willard B. Stier, for plaintiffs.

Lawrence Maxwell and *E. W. Kittredge*, contra.

PROCTER & COLLIER *v.* F. J. DIEM, RECEIVER.

It is incumbent upon a party who seeks to recover upon a verbal contract, not only to establish his own understanding of it, but also to show that the other party so understood and assented to it.

HOSEA, J.

Decision on final hearing.

The plaintiffs contend that the defendant agreed to "bronze" ten thousand catalogue covers furnished them for that purpose, and did so in so unskillful a manner as rendered them unfit for use, and compelled the purchase and substitution of new material.

Defendant claims that he simply rented to plaintiffs the use of a bronzing machine, as a matter of neighborly accommodation, to be operated under direction of plaintiffs' foreman, and had no further part or responsibility in the matter.

The injury consisted of finger-marks, evidently caused by careless handling of the fine, highly-glazed sheets.

The evidence showed that the sheets were printed with the sizing in plaintiffs' shop, delivered in variable quantities as the work progressed, to boys employed by plaintiffs and by them carried through plaintiffs' shop and upstairs through an intervening hallway into and through defendant's shop and there delivered to the bronzing machine—the work occupying about two days.

There was no direct evidence as to how the soil marks occurred, but they evidently were put on the paper prior to entering the bronzing machine, and presumably between the sizing machine and the bronzing machine, and by dirty and sweaty hands. I say, presumably, because the operators of both machines were clearly shown to be skilled and careful persons accustomed to use the utmost care in such manipulation.

There is some conflict of testimony, but none at all upon the decisive features of the case, which are as follows:

(1) It is incumbent upon a party who seeks to recover upon a verbal contract not only to establish his own understanding of it, but also to show that the other party so understood and assented to it.

This has not been done. It is clearly shown by the defendant that he merely rented the use of his machine, and took no further responsibility; and the fact that plaintiffs' foreman kept close supervision of the work and admitted that he came up to see how it was going on, about ten times a day, is a strongly corroborative circumstance in connection with the further admitted fact that no claim was made after all the work was done. These defects were visible as the work progressed; and it is impossible to believe that the foreman was ignorant of them.

(2) But, taking the view of the plaintiffs as to the contract, they are required to prove the delivery of the sheets to defendant in good order and without soil marks, inasmuch as there is no proof that the marks occurred while in defendant's custody. On this basis, the proof also fails. Moreover, circumstances render it altogether probable that the soil marks occurred during the carriage of the sheets in small quantities from the sizing to the bronzing machine.

Upon the whole case the preponderance of evidence is in favor of the defendant, and judgment must be rendered accordingly.

Judgment for defendant.

Aaron A. Ferris, for plaintiff.

Fred Hertenstein, contra.

JULIA W. HOPPLE *vs.* THE FOURTH NATIONAL BANK.

HOSEA, J.; SMITH and FERRIS, JJ., concur.

The essential facts shown by the record are as follows:

Charles H. Flack, guardian of Julia W. Hopple, borrowed of the Fourth National Bank, during his guardianship, a considerable sum which he mingled with funds of the guardianship and invested in real estate in the name of the ward for her benefit.

In June, 1895, upon termination of the guardianship by the ward attaining majority, the final account filed by Flack in the probate court and confirmed, showed a balance due him of \$4,070, which account was contested by the late ward in the common pleas court with partial success, but, on appeal by Flack to the circuit court, was established and adjudged as to balance of \$2,635.90, with interest from June 27, 1895; which finding and judgment are now absolute and not collaterally impeachable.

In May, 1896, a considerable balance of the money borrowed from the bank being still unpaid, Flach assigned to the bank his claim against Julia W. Hopple in virtue of his said account as guardian, as confirmed by the probate court, and this claim, the bank, as assignee, seeks to have satisfied by a sale of the real estate of Julia W. Hopple.

The court below found the equities of the case in favor of the bank, and decreed accordingly.

We find no material error in the proceedings and judgment below, and therefore affirm said judgment with costs.

Judgment affirmed.

W. L. Granger, for plaintiff in error.

L. C. Black and Morrison R. Waite, contra.

THE CINCINNATI TRACTION COMPANY v. JOHN ROOM,
ADMINISTRATOR.*

While it is the duty of a jury, sitting in a case brought for damages for wrongful death, to consider the pecuniary injury to each beneficiary, the verdict should be for a gross sum, to be subsequently apportioned among the beneficiaries in such a manner as is fair and equitable; and a refusal by the trial court to give special charges, necessitating a finding by the jury proportioning the amount to be recovered among those for whose benefit the action was brought, is not error.

FERRIS, J.; HOFFHEIMER and CALDWELL, JJ., concur.

This was an action brought by the administrator to recover damages resulting from wrongful death, under Section 6134 of the Revised Statutes; and contention is made that there is error in the refusal of the court to give certain special charges necessitating a finding by the jury proportioning the amount to be recovered among those for whose benefit such action was brought.

The statute, 6135, provides—

“That every such action shall be for the exclusive benefit of the wife or husband and children, or, if there be neither of them, then for the parents and next of kin of the person whose death has been caused, * * * and in every action the jury may give such damages * * * as they may think proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefits such action shall be brought.”

Contention is made that the trial court should have instructed the jury, that as the evidence showed that two sons and a married daughter, adults, were able to earn their own subsistence, they were not entitled to be considered beneficiaries, and such conclusion was fairly inferable from a clause in this same act giving the court the power to make a fair and equitable distribution of the assets, having refer-

(* Affirming the charge of the trial judge Hosea.)

ence to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates.

The objection to the contention that the jury making the award could take into consideration the age and conditions of the beneficiaries, is answered by the provisions of 6135, wherein it is provided that the "amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment." The probate court, therefore, is, by the statute, vested with plenary power to determine all questions of distribution of the fund, the amount of which only was to be determined by the jury to whom the charge was given.

In the case of *Wolf, Administrator, v. The L. E. & W. Railroad Company*, 55 O. St., 517, it was held that an administrator is a mere nominal party having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiary in said sections named (referring to Sections 6134 and 6135, R. S. O.). And the Wolf case determines, in our judgment, that, while it was the duty of the jury to consider the pecuniary injury to each separate beneficiary, the verdict should be, as it was, for a gross sum of money, to be subsequently apportioned among the beneficiaries in such manner as should be fair and equitable; and there is nothing in the record to indicate that such a course was not followed.

We find no error in the position taken by the court in this or any other grounds alleged for error. And we, therefore, affirm the judgment.

Paxton & Warrington, for plaintiff in error.

Galvin & Galvin and *W. A. Geohegan*, for defendant in error.

WILLIAM J. CLARKE v. THE CITY & SUBURBAN TELEPHONE
ASSOCIATION AND THE RECEIVERS OF THE MIAMI
ERIE CANAL TRANSPORTATION COMPANY.

The reciprocal relation of duty and obligation between two public utility companies, having rights in the streets secondary to those of the public for ordinary travel, extends as to each other only to the extent of avoiding acts of omission constituting willful negligence; and hence a repairer of telephone lines who is injured while attempting to string a damaged and imperfect wire by its coming in contact with an unguarded and uninsulated wire of another company carrying a current of dangerous voltage, has no cause of action against such other company.

HOSEA, J.

Heard on demurrer.

The pertinent facts disclosed by the petition in this case are as follows:

That the plaintiff, an employe of the telephone association, was engaged in stringing a wire across the "live" wires of the transportation company at a point where the wires of the two companies cross, and that said wire while being placed in position loosened and fell upon one of the wires of the transportation company, charged with a current of high voltage used in its business, and that the injury complained of ensued thereby.

The negligence claimed against the receivers is (1), that they maintained their wires in an unsafe and dangerous condition; (2) that their wires were "apparently insulated, but not in fact insulated," which was known or might have been known by the exercise of ordinary care to the receivers, but was not known to plaintiff; (3) not inspecting their wires to ascertain whether they were in safe and proper condition—all without plaintiff's knowledge; (4) not maintaining a non-conductor or guard wire between said crossing wires to prevent contact.

He further alleges that his duties were to repair and to string telephone wires, and that his employment compelled him to work among wires carrying high and dangerous voltages of electricity; and further, that the particular wire he was stringing in the present instance was "damaged and in an imperfect condition," and claims negligence against his employer as to the "quality of the wire selected to be placed at said point," in a position that brought the wires within an unsafe and dangerous distance.

The demurrer is for want of facts sufficient, etc.

"Negligence," as has been well said, "is not absolute or intrinsic, but is always relative to some circumstance of time, place or person." *Needham v. R. R.*, 37 Calif., 410.

And it is a familiar rule that the omission of a duty is not the foundation of an action, unless it results in injury to one for whose protection the duty is imposed. *Burdick v. Cheadle*, 26 O. St., 393; *Erie R. R. v. McCormick*, 69 O. S., 45.

In cases of the nature of that under consideration, an obligation of care and a corresponding liability for negligence, are based upon the primary right of the public to the use of the streets for ordinary travel, and the theory that a quasi public use for certain other purposes when properly conducted is no impairment of the primary right. The secondary use, therefore, carries with it the obligation to use proper means for the protection of the public against injury arising out of the secondary use, through negligence in respect of such means of protection. The duty of proper maintenance and protection to the public is therefore inherent in the secondary use of a public street.

But upon what principle can a reciprocal relation of duty and obligation be said to exist between two secondary users of streets, in respect of such use, except as to non-interference and avoidance of acts of omission constituting willful negligence?

The plaintiff here was the servant of the telephone company—not of the receivers. In taking service with the company he assumed all ordinary risks of the business as it existed and was conducted, excepting negligence of his

employers in respect of duties toward himself. The stringing, placing and repairing of wires, and working among wires carrying high voltages of electricity, were, as he admits, among the incidents, and, consequently, the risks of his employment. The crossing of the telephone wires over those of the receivers at the place mentioned was a condition known to him. The absence of guard-wires between those of the telephone company and the transportation company was an existing visible incident of the situation where he was at work when he entered upon it.

The extent to which courts have gone in holding parties to accountability for omission to provide guards under such circumstances, is in cases where a crossing wire, above a "live" wire, is negligently supported so as to be obviously liable to fall or sag into contact and thereby endanger the safety of the public using the streets. This is illustrated in the two cases cited against the demurrer in the briefs of counsel.

Thus, in *McKay & Roche v. Telephone Co.*, 6 Am. Elec. Cas. (Ala.), 223, the case depended to some extent upon a municipal requirement for guard wires, yet the court in its opinion rested its judgment chiefly upon the fact that the telephone wire was maintained with the knowledge of the street railway company upon "frail, weak and insecure supports, likely to give way and precipitate the telephone wire upon the line wire below." The court found that this condition, being a fact in evidence, enlarged the duty and obligation of the railway company in its relation to the public to protect them against this impending danger—just as would be the case of an ordinary railway company having notice of a rock or dead tree at the side of its roadway "which it had constantly recognized as threatening to fall" upon the track.

So, also, in *Telegraph Co. v. Baltimore City Ry. Co.*, 6 Am. Elect. Cas., 210, the negligence found was permitting a sagging telephone wire, negligently attached, to swing and rub against a feed wire of the railway company, for two weeks, and thus wear through the insulation.

It will be observed that in both of these cases the injury

was to passers-by on the street; yet, the obligation of care and corresponding liability for negligence is imposed on the defendant street railway company in respect of guard-wires, only because of conditions known, or so long existing as to finally produce the injury complained of. The negligence was in ignoring conditions that immediately threatened; and it is manifestly proper to hold that in respect of the independent duty owing to the public by one who maintains dangerous agencies, it makes no difference who or what occasions the threatening conditions. It is the existence of threatening conditions, and the notice thereof, direct or presumptive, that raises the duty to provide against the happening of the dangers which these conditions portend.

The case in hand presents no such conditions. The receivers had a right to presume that in stringing or repairing wires at the point in question the telephone company would exercise due care, employ properly skilled servants, and use proper material. As the receivers are not required to anticipate negligence, they can not be required to anticipate and provide against its consequences, except it be a visible negligence tending to obvious and definitely dangerous consequences as already shown. Certainly they could not be held to anticipate consequences flowing from the act of stringing defective wire by the telephone company.

In fact, the weight of authority is to the effect that while the absence of guard-wires may be an element of negligence, it can not be said, as a matter of law, that either or both of two companies maintaining different lines of wire in the same street, are bound, in the absence of negligence, to maintain guard-wires for the purpose of preventing the harmless wire of one from coming in contact with the dangerous wire of the other. *Kenby on Elect. Wires*, Section 269; *Albany v. Waterliet, etc., Co.*, 76 Hun., 136; *Block v. Milwaukee*, 89 Wis., 371; *Lincoln St. Ry. Co. v. Cox.*, 47 Neb., 807.

Calumet St. Ry. Co. v. Grosse, 70 Ill., 81, presents a state of facts quite similar to those of the present case and the decision is in line with the views herein expressed. How

far these views might receive support from the fact that the wire system of the receivers is maintained upon a right of way leased to the M. & E. Canal Transportation Company by the state, and not upon a public street, I have not considered; although it might, in an ultimate consideration, be important.

No facts are pleaded in the petition raising any obligatory relations in law, in respect of the maintenance by the receivers of the wire system in question, toward the plaintiff, and this is fatal to the action so far as it affects the receivers as defendants; consequently, as to these the demurrer must be sustained, and it is so ordered.

Demurrer sustained.

John P. Ryan and Renner & Renner, for plaintiff.

Ellis G. Kinhead and Geo. H. Warrington, contra.

CITY OF CINCINNATI, BY SOLICITOR, v. WM. F. GASS, SUPERVISING ENGINEER, ET AL.

The ordinance of the city council creating the supervising engineer's department, providing for the office of Supervising Engineer, fixing its term and compensation and prescribing its duties, is a valid exercise of the power conferred by the code of 1902.

The ordinance being silent as to the mode of appointing the supervising engineer, the power of appointment is vested in the mayor, under Section 223.

HOSEA, J.

Demurrer to petition.

Suit is brought, on request of a taxpayer, alleging the passage of an ordinance on May 4, 1903, creating a "supervising engineer's department" to regulate and compel the consumption of smoke, and to "prevent injury and annoyance therefrom," within the corporate limits of Cincin-

nati. The ordinance provides for a supervising engineer and stenographer; fixes their terms of service and compensation; defines their authority and duties; declares the emission of smoke under certain circumstances to be a nuisance and a misdemeanor; prescribes the punishment therefor, and specifies further duties of the supervising engineer in relation to the prosecution thereof, and also the duties of the mayor in the same connection.

The petition claims the appointment by the mayor of William F. Gass as such supervising engineer, the creation of the department, and the proposed expenditure of funds in pursuance of the ordinance, are unauthorized by the laws of Ohio; and alleges that neither said laws nor the ordinance in question provide by whom such appointment shall be made, and that the ordinance involves a misapplication of the funds of said city, and that any action by said supervising engineer would be an abuse of the corporate power of the city.

Predicated upon these allegations, the court is asked to enjoin said Gass from any action or expenditure as supervising engineer under said ordinance, and to enjoin the auditor from approving any order for funds or drawing any warrant upon the city treasurer by virtue of said ordinance.

The suit involves no question of constitutional power as to any specific law, but questions the legal authority of council to pass the ordinance in question, and the power of the mayor to appoint, under the ordinance as passed.

The power exercised by council in the premises was derived from the municipal code passed by the General Assembly of Ohio at the Extraordinary Session of 1902 (96 O. L., 20), "to provide for the organization of cities," etc. Division 2 of this act, under the head of "General Powers" (Section 7), provides as follows:

"All municipal corporations shall have the following general powers and council may provide by ordinance or resolution for the exercise and enforcement of the same."

Following is a list of powers of a varied character such

as are or may be properly delegated to and exercised by municipal organizations—some having relation to restraints upon the conduct of individuals in the interest of general peace and good order; others to protection from nuisances and annoyances; others to regulations of business transportation, etc., and still others to health, public improvements and public morals—all, however, falling within the domain of the police powers of a state or municipality, as commonly recognized and upheld by courts of law.

Among these general powers thus conferred, is the following:

“(3) To prevent injury or annoyance from anything dangerous, offensive or unwholesome; to cause any nuisance to be abated, and to regulate and compel the consumption of smoke, and prevent injury and annoyance from the same; and to regulate and prohibit the use of steam whistles.”

It is manifest, that the ordinance in question is drawn, primarily, under and by virtue of this grant of power, coupled with the power to provide by ordinance for its enforcement and exercise—which latter is, however, implied in the former.

The first question for determination then is: Whether the creation of a “supervising engineer’s department” and of the office of “supervising engineer,” is proper exercise of the power vested in council by the law quoted?

Obviously, the “department” and the “office,” thus created, were intended to constitute the agency deemed appropriate by the council for “regulating and compelling the consumption of smoke,” etc.; and if we consider the nature of the various other powers vested in the municipality by the act in question, we see that very many require special agencies for their due exercise and enforcement. To great agencies,—the police department, fire department, board of health, board of public service,—many of these duties are assigned; but others require the creation of special agencies, such as market master, building inspector, city weigher, water works department, platting commission, park superintendent, etc., by whatever name they may be called.

The general principle applicable to the case in hand has been long settled under the federal Constitution, namely, that within the range of subjects committed to its care, the legislative authority may adopt whatever means it deems proper which may tend to give effect to the general provisions of the fundamental law. As was said by Chief Justice Marshall in the early case of *Fisher v. Blight*, (2 Cranch, R., 396):

"It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means whether they are in fact conducive to the exercise of a power granted by the Constitution."

This question was further considered in *McCulloch v. The State of Maryland* (4 Wheaton R., 316), upon a most elaborate presentation by some of the ablest advocates of the nation, including Webster, Pinckney and Wirt; and the decision of Chief Justice Marshall has always been regarded as a masterpiece. Among other things, he said:

"We think the sound construction of the Constitution most allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The doctrine thus established by these and by a multitude of later cases in federal and state courts, is so manifestly just and so beneficent in its operation, as to command acceptance and application wherever kindred conditions exist.

The grants of power in the code are—as in the federal Constitution—by enumeration, and not by definition; and in the particular grant under consideration, the nature of the requirement, viz., “to regulate and compel the consumption of smoke and prevent injury and annoyance from the same,” is such as may well demand the exclusive time and attention of a skilled expert, not only because of the magnitude of the evil in large cities like this, but by reason of the inherent difficulty, in the present state of scientific knowledge, of applying that knowledge consistently with economic conditions to the accomplishment of the obvious intent of the law. The court must take judicial knowledge of the fact that the problem of smoke prevention, which is the thing contemplated by the law, is one that has for many years taxed the thought and skill of engineers and scientific experimenters throughout the civilized world, with but little progress in a direction in all respects satisfactory, or that has brought forth methods and appliances applicable to existing conditions, and consistent with cheap manufacturing production upon which so much of our material prosperity depends.

Under such conditions, under a law committing the subject in general terms to the legislative branch of the municipal government, and with only the question of appropriateness of means selected, open to judicial interference, I can not but hold that the creation of a department or bureau of the municipal government for the accumulation of information upon this subject, and for the creation of a continuing office with such compensation as may secure an incumbent possessing the requisite ability to understand and keep in touch with the progress of the world in this direction and gather and digest the results achieved elsewhere for the benefit of the community he serves, is a reasonable and appropriate means plainly and well adapted to the end contemplated in the initial grant of power and in consonance with the letter and spirit of the code.

The remaining question has relation to the power of the mayor to appoint, in the absence of a specific direction in the ordinance.

The mayor is the executive head of the municipality, and his duty generally is to see to the proper execution of ordinances. While under the code, the executive power is vested in the mayor and other designated officers (Section 128), the mayor still remains the official executive head, with all power properly appertaining to his office not specifically allotted to other agencies of the municipal government. This is practically the effect and meaning of Sections 129, 130 and others—especially Section 225—giving the mayor general supervision of all departments and officers provided for in the code.

In respect of certain specified departments, the code has provided for the modes of appointment of officers and employes, and in Section 223 there is a residuary provision, as follows:

“All appointments authorized by this act or by any ordinance shall be made by the mayor, unless otherwise specifically provided in this act.”

The contention of the plaintiff on the point under consideration seems to be based upon a strained and unnecessary construction of the words “appointments authorized by this act or by any ordinance.” The ordinance creates the office, fixes its term and compensation and defines its duties. It is fundamental law in Ohio, that the Legislature can exercise no appointing power excepting such as may be prescribed in the Constitution (Const., Article II, Section 27), although it may direct, by law, the manner in which officers may be elected or appointed. In the grant of power to municipalities, therefore, the Legislature very properly vested only legislative power in the council (Section 116), expressly denying the appointive power (Section 123), excepting in respect of its own offices and employes.

Now the question of the manner in which an appointment shall be made, and the power of making an appointment, are quite distinct, involving the exercise of totally different functions, one legislative, prescribing how the act shall be done, and the other administrative, which is the doing of it (29 O. St., 102, *State v. Covington*).

In the present case, the council, by the ordinance in question, completely performed the legislative act, to-wit, created the office, fixed its term and salary, and prescribed its duties; and properly stopped there, because, as the office was of a general character not covered by other jurisdictions provided in the code (such for example as the Department of Public Service), the appointing power was necessarily lodged in the mayor, not only by virtue of his office, but by express enactment of the code in the residuary clause, Section 223.

I hold, therefore, that the ordinance in question, by fair construction, authorized the appointment of a "supervising engineer," and that the appointment of defendant, Gass, was properly made by the mayor by virtue of the duty imposed by Code, section 223.

Upon the whole case, therefore, the demurrer is well taken, and will be sustained; and, as the case is of a nature that presents only questions of law covered by the demurrer, judgment of dismissal may be entered forthwith.

Charles J. Hunt, for plaintiff.

Frank F. Dinsmore, contra.

BERTHA FELDNER v. FRANCIS B. ANDERSON ET AL.

HOSEA, J.

Heard on demurrer to interrogatories.

The code provision for interrogatories is discussed in *Chapman v. Lee*, 45 O. St., 356 (365-6), as a substitute for the old Bill of Discovery in Equity, and in *Graham v. Telephone Co.*, 2 N. P.—N. S., 612, and the principle extended to "information sought by the interrogatory which will be material or relevant to the relief sought by the petition."

The issue tendered by the petition is the joint negligence of defendants under circumstances where the information

desired may well be presumed within the knowledge of defendants and not of plaintiff. Giving the code provision the liberal construction and administration required by its provisions, the court is of opinion that the interrogatories numbered 1 to 5, inclusive, may be said to be pertinent as touching the joint responsibility of defendants—and possibly others with them. For the same reason numbers 8, 10 and 12 may be passed as pertinent because relevant to this issue. But numbers 6, 7, 9, 11 and 13 quite as certainly are not pertinent in any aspect.

It may be objected that those sustained go to merely evidential facts; but negligence is never susceptible of direct proof, but is always an inference from facts shown—a legal inference from physical facts. A joint relation is of the same character in respect of proof.

Demurrer sustained as to interrogatories numbered 6, 7, 9, 11 and 13; overruled as to those numbered 1, 2, 3, 4, 5, 8, 10 and 12.

Answers required in ten days from entry.

Clare, Dickerson & Clayton, for plaintiff.

Moulinier, Bettman & Hunt, for defendants.

JOHN McDERMOTT *v.* THE CINCINNATI SUBURBAN BELL
TELEPHONE COMPANY.

HOSEA, J.

Heard on demurrer.

The petition states two distinct causes of action, namely, the *first* based on negligence of an employer in respect of defective appliances, and the *second* on alleged unskillful treatment by defendant's physician.

The demurrer as to the first cause of action seems to be based on a misreading of the petition.

The petition, although not clearly worded, follows the rule of *Coal Co. v. Norman*, 49 St., 598 (cited with approval in *Hesse, Adm.x., v. R. R.*, 58 St., 170), and alleges knowledge of the defect on the part of the master and ignorance on the part of the servant who is the plaintiff.

As to the second cause of action, the demurrer is well taken. The master is under no obligation to furnish a physician to attend the servant's injuries, and is, therefore, under no liability for his want of skill, unless he can be shown to have been negligent in selecting (1 Sh. & Redf. on Neg., Sec. 168).

Demurrer sustained as to second and overruled as to first cause of action.

Outcalt & Foraker, for the demurrer.

Byron M. Clen Dening, contra.

WEHRMAN v. RABER ET AL.

HOSEA, J.

Heard on demurrer to petition.

The action is for damages under the common law for removal by adjacent owner of the ancient lateral support of plaintiff's lots.

The common law rule in this behalf is not abrogated in Ohio. This time-honored rule, however, was limited in operation to lands and did not include liability with respect to artificial burdens, such as buildings, placed on lands by the owner. Our statute extends this liability to include buildings and walls under certain conditions. It also modifies the rule to the extent of providing for the grading of lots to conform to the established grade of streets on which lots abut. But the extension and modification do not abrogate the rule and it is still in force. The language in *Hall v. Kleeman*, 7 N. P., p. 201, is in this respect inaccurate and misleading.

Demurrer overruled with leave to answer in thirty days.

MUENCH *v.* CINCINNATI TRACTION CO.

Whether a co-employee is a superior servant or merely a fellow-servant is a question of fact to be submitted to the jury upon the evidence as to all the circumstances of the case, and not one of law to be determined by the court.

HOSEA, J.

The principal question raised upon this motion relates to the doctrine of superior as contrasted with fellow-servants.

The evidence on behalf of plaintiff tended to show that he was at work as a "helper" to Roland, the boss carpenter, in putting in a new stringer to support the track across a drain excavation, and was under his control and direction; that in doing said work it was necessary to stand in said excavation astraddle of the track and stringer to tamp in the foundation stones with a sledge hammer, and that to do said work it was necessary to bend over and downwards in such a position as to be unable to see up the track without interruption of his work; and that during the progress of the work and on previous occasions Roland had given him due warning of the approach of trucks, and he relied upon such warning being given in this instance. Roland admits that he gave the warning too late in this instance because he was "dreaming" or was "absent-minded." There was also testimony showing that in the work of the company on this and other inclined planes the men were accustomed to give warning notice to each other of the approach of trucks; and it was inferentially shown that the company made no provision otherwise for the protection of the men in their dangerous employment.

The injury to plaintiff was received while engaged as aforesaid and by reason thereof the proximate cause of the injury was claimed to be Roland's failure to give proper warning.

The motion for a new trial is based chiefly upon the refusal of the court to give certain special charges, all of

which involved as their predicate an assumption that the relation of superior servant can exist only by direct authorization by the master; or that, in the absence of a rule of the company providing for warnings to men while at work on the plane, a custom among the employes must be shown, so established and well known as to have the force and effect of a rule of the company. Upon these considerations, the court was asked to instruct a verdict for the defendant under the evidence.

These charges were properly refused. The general charge of the court was based on the theory that the relation of co-employes—whether a co-employe was a superior servant, or merely a fellow-servant—was a question of fact to be submitted to the jury upon the circumstances of the case, and not one of law to be determined by the court; and that the authority of one servant to act in a capacity representative of the master was deducible from the course of business as well as by proof of direct authorization.

Upon this review of the proceedings and charge, as necessitated by this motion, I am the more firmly assured of the correctness of this position.

As early as *Whalen v. Railroad*, 8 O. St., 250, the test of the relationship of co-employes of a common master—whether as being a fellow-servant or a superior—is stated as the “relation of subordination” one to the other, and this was but the corollary of an earlier case holding co-employes to be fellow-servants where the “business is managed as much by one as by the other.” *Railroad v. Stevens*, 20 O., 416.

That the relation may exist only in respect of the work in hand is shown in *Railroad v. Leach*, 41 O. St., 388, where a track hand and his foreman were held to be fellow-servants in respect to an accident upon a handcar in which they were proceeding to work. This, again, is but a concrete illustration of the principle of *Railway v. Lewis*, 33 O. S., 196, holding that “whether one servant is placed by a common master under control of another, thereby creating the relation of superior and subordinate, must be determined by the evidence in each particular case.”

In *Railroad Company v. Margrat*, 51 O. S., 130 (142), the case last cited is discussed and the principle is recognized that the relation of subordination may be shown by the express rule or recognized custom of the master's business giving authority to one to direct or control another in the discharge of his duties, and that if this be shown the relation of superior and subordinate is established.

In *Wellston Co. v. Smith*, 65 O. S., 70, it was held that where a mine boss temporarily enjoined performance of his duties upon a miner, the miner was, as to the performance of such duties, not a fellow-servant of those employed on that work.

The case of *Railway Co. v. Lavally*, 36 O. S., 221, presents an analogy to the case at bar, as will appear from the following extract from the opinion:

"The claim on behalf of the company is that * * * in the matter of keeping watch and lookout for danger no relationship of superior and subordinate existed; that in this respect they were merely fellow-servants engaged in a common service. * * * The service required of these hands was peculiarly dangerous; and it was the duty of the company to make reasonable regulations or provision to protect them from the dangers to which they were exposed from moving trains and cars while engaged in the discharge of their duties. The hands, under the regulations of the company, were in charge of Fox, who, in directing their operations, was the representative of the company. No other provision seems to have been made for their government or protection. By setting Lavally to work under the car, where, by the exercise of reasonable care he could not discover an approaching train or car in time to save himself from injury, it was the duty of Fox to see that reasonable precautions were taken to guard him against such danger; and for the injury resulting from such neglect the company is liable."

And the principle of this case is reasserted in *Railway v. Henderson*, 37 O. S., 552, and *Dick v. Railway*, 38 O. S., 389.

In *Railway v. Murphy*, 50 O. S., 135, we have another

analogous set of circumstances. A track repairer was engaged with others in bolting rails, and the duty of deceased required him, in bolting on the splice plates, to "stoop over facing the track with his head in such a position that he could not, without interrupting the work, see any considerable distance along the track"—"but no unusual cause existed why deceased should not hear or see the train," as in fact the others did.

The court sustained the verdict and judgment below, upon the general ground that it was proper to leave to the jury the question whether, from the nature of the business and the circumstances of the case, the company should not have anticipated the necessity of giving proper warning and suitably provided for it.

Taking these cases together, the principles governing the case in hand are clear and unmistakable. The case of *Kelly Island Co. v. Pachuta*, 69 O. S., 462, is in line with the previous decisions and constitutes no exception. So, also, that of *Railway Co. v. Rigby*, 69 O. S., 184, in which the servant was ordered by telegraph to get a car ready, and in that work undertook to thaw out a frozen heater which had neither safety valve nor steam gauge, and was injured by an explosion which naturally followed. As there was no present direction or control, the servant, "Rigby, was left to his own judgment as to the manner of performing the duty." I have also considered the circuit court cases of *Packet Co. v. Britton* (1 C. C., N. S., 33); *Hill v. Railway Co.* (22 C. C., 291), and *Rubber Co. v. Tobin* (3 C. C., N. S., 59), but do not find them inconsistent with the views herein expressed as applicable to the present case. *Rubber Co. v. Tobin* is an exemplification of the rule in the Rigby case above cited.

The verdict of the jury seems to me a liberal one in amount, but as it is quite within the limits established by cases of this nature, I can not on this account disturb it.

Motion overruled.

Paxton & Warrington, for the motion.

Horstman & Horstman, contra.

WOODSON WEAVER v. JOHN H. LINNEMAN.

1. The rule that a plaintiff must prove facts which establish defendant's negligence as the proximate cause of the injury complained of, is not satisfied where, under the most favorable view that can be taken of the evidence, it goes no further than to establish a presumption of the facts to be proved.
2. And where in order to establish plaintiff's case proof is necessary which involves the commission of a heinous crime, it must be proof which carries conviction beyond a reasonable doubt.
3. Where a case has failed because of the unsatisfactory character of the proof offered, it is not helped by the discovery of new evidence of a merely cumulative character.

HOSEA, J.

Motion for new trial.

I have reviewed with care the testimony in this case, also the action on motion to instruct a verdict. The suit is against a druggist for negligence in selling "Rough on Rats" to a minor son of plaintiff, who, it is alleged, put the same in the breakfast coffee at home, whereby the father partook of it and was poisoned and suffered great pain and permanent injury. The testimony is entirely circumstantial and necessarily divides upon two converging lines, namely:

(1) The *corpus delicti*—that tending to show that the father was in fact poisoned by drinking coffee containing "rough on rats" and was thereby injured; and

(2) That tending to trace the poison in the coffee to the act of the son, and through him to the druggist who sold it.

On the first point the outline of testimony is that the father was taken sick immediately after partaking of the coffee; the physician diagnosed the symptoms as indicating some poisonous irritant; found a grayish sediment in the coffee-pot from which the coffee had been thrown out; and without further examination sent the father (and an older son in the same condition, who died), with the coffee-pot, to

the hospital, where the identity of the coffee-pot is completely lost.

Next, a coffee-pot, unidentified, is produced at a coroner's inquest upon the death of the older son, and a deposit therein is found by analysis to be composed largely of barium carbonate, but no trace of arsenic. Upon the assumption that arsenic had been present but dissolved and thrown out with the coffee, testimony of a hearsay character was sought to be introduced to show generally that "rough on rats" contained arsenic associated with barium carbonate. No testimony was offered to show that the composition of "Rough on Rats" was according to a standard formula, known in the dispensatory, nor to show that barium carbonate was not used alone or in other entirely different compounds. But, supposing the chain of evidence, according to the intention, ever so perfect, its highest possible result would be a *presumption* of the fact to be proved.

On the second point the outline of testimony starts with the admitted sale to the young son, who was ten to eleven years old. The father testifies that he *heard* this son in the kitchen during the preceding evening while the coffee-pot was there, containing coffee prepared for the next morning's breakfast; that he called to him and heard his answer. There is also testimony of a woman that after the poisoning she saw this son throw away a box; and that going to the place afterward she picked up a box-lid resembling a box-lid of "Rough on Rats," as exhibited to her at the trial, she being unable to read. She afterward put it back where she found it; and it was picked up by a policeman. Neither the policeman nor the box-lid were produced or accounted for, nor was there any proof of motive or ground of ill-will on the part of the boy.

The affidavit of newly-discovered evidence now filed states that a man saw the boy between eight and nine o'clock A. M. empty a coffee-pot out of a window in the side yard, which is cumulative.

But taking it all together, and giving all possible effect to this line of testimony, it also leads to a *presumption* of the other fact to be proved.

So that under the most favorable aspect possible, the case, as a whole, presents the proposition of a presumption based upon a presumption, which is fatal under established rules of law. *Manning v. Ins. Co.*, 100 U. S., 693; *Bank v. Stewart*, 114 U. S., 224; *Cunard Steamship Co. v. Kelley*, 126 Fed., 610.

But in point of fact, neither presumption can be sustained upon the testimony as given under familiar rules of evidence. In the previous consideration I cited the Ohio cases of *Rwy. v. Andrew*, 58 O. St., 429; *Rwy. v. Marsh*, 63 O. St., 250; *Rwy. v. Osborne*, 66 O. St., 48.

The Supreme Court of the United States has also dealt with the principles that govern here. Thus in *U. S. v. Ross* (92 U. S., 281), it is said:

"Not only must the fact from which the inference is drawn be established in evidence and not rest on the accuracy of a reasoning process, but the inference to which it gives rise should, in the majority of cases, be strong and almost inevitable. * * * No inference of fact should be drawn from premises that are uncertain."

Shearman & Redfield on Negligence, par. 57, states the rule in these words:

"The rule is well established that the plaintiff must prove facts from which it may be fairly inferred that the defendant's negligence was the proximate cause of the injury. Mere surmise or conjecture on any of these points will not do" (see also, Starkie on Evidence, 80; 187 Penna St., 451; 126 Fed. (*supra*)).

Under the application of these rules, the missing links in the chain of sequences will be apparent.

But, with respect to the complicity of the son, another principle is involved, to which counsel seemed to take exception in the argument. It is this—that in considering the effect to be given to circumstantial evidence involving a finding of turpitude against a party, the evidence must overcome the presumption of innocence. *Lyon v. Fleahman*, 34 O. St., 151.

More than this: where it involves the finding of the commission of a heinous crime the proof must go further and

be such as to carry conviction beyond a reasonable doubt. *Ins. Co. v. Pavor*, 16 O. St., 324; *Strader v. Mullane*, 17 O. St., 624.

The newly-discovered evidence is in its nature cumulative, and moreover it does not affect the objections stated nor could it change the result. *Laeffner v. State*, 10 O. St., 598; *Moore v. Coates*, 35 O. St., 177; 5 O., 375; 11 O., 147.

The motion for new trial must be denied.

Kelley & Follett, for the motion.

E. M. Ballard, contra.

GEORGE REUTER v. ALBERT SCHNEIDER.

HOSEA, J.

Heard on motion to require petition to be made more definite and certain.

The motion seeks to require plaintiff to designate the machine alleged to have been defective and out of repair, etc.; and to designate also the defects and particulars of the want of repair. Also, to designate more particularly the "certain bones" of the body of plaintiff alleged to have been broken; etc.

In *R. R. Co. v. Kistler*, 66 O. S., 326 (333), the rule of *Davis v. Guarnieri*, 45 O. S., 470, is repeated and emphasized, namely, that the allegations as to negligence must be of the facts—"the acts of commission and omission claimed to have caused the injury, so as to advise the defendant as to the facts claimed to have been negligently done or omitted and enable it to meet the same. Upon the trial the evidence should be confined to the acts of negligence so *specifically and definitely* averred in the petition."

This, moreover, is in accord with the code provision requiring the pleader to state the *facts* constituting the cause of action. The statement of negligence is the legal con-

clusion and not the primary fact required to be pleaded.

The same rule applies to the particulars of the injury claimed as the basis of the action (see also, *Ry. v. Lockwood*, 72 O. S., 586).

Motion granted.

Robertson & Buchwalter, for the motion.

Scott Bonham, contra.

THE UNION SAVINGS BANK & TRUST COMPANY V. THE
PIKE BUILDING COMPANY.

In a foreclosure suit the power to control the subject-matter of the lien is incidental to jurisdiction of the cause from its commencement.

HOSEA, J.

Heard on motion for receiver.

I entertain no doubt, that, in a foreclosure suit of this nature, the control—or the power of control—the subject-matter of the lien, is incidental to the court's jurisdiction of the cause from its commencement; and this is for fundamental reasons, one of which is, that, as the suit has reference to action upon a specific estate and no other, the court must, in the nature of things, have this control in order to be able to enforce its own decree. In this sense, at least, it is a suit *in rem*. Nor can there be any doubt of the power of the court to exercise this control in a special way—as by taking the estate into actual possession by a receiver—whenever any of the statutory grounds exist.

The interests here involved are unusually large, and the natures of the lien and of the estate are peculiar. The lien is upon a complicated leasehold with many conditions and covenants to be performed to avoid forfeiture, and with

fixed charges to be provided for in large amounts from time to time. Its present condition of absolute paralysis as to its power to produce income to meet these charges, coupled with the insolvency of the mortgagor, make the danger of material injury imminent; and the only visible source of protection against these and perhaps other evils, is the large interest of the bondholders which they must protect by advances in order to prevent disaster. It seems to me, therefore, in an especial and peculiar sense, a case where the power of the court ought to be exerted to preserve this estate by taking it into actual possession for the general benefit, thus placing the bondholders in such a position as to justify the necessary advances.

I feel myself morally constrained to take this course, because the investors have a strong moral as well as legal right to ask this to be done. They have invested their money upon the faith of the direct remedy in a court with full equity powers, which their contract with the defendant gave them; and it is the inviolability of this character of security, and of its direct method of enforcement, which gives to bonds, which circulate by mere delivery, their value. Any failure of the court to aid the free exercise of this remedy, in cases of this nature, would be a public misfortune, because it would tend to render difficult the raising of money in meritorious enterprises in the future by destroying the fundamental basis of the confidence of investors.

And these considerations, with others, lead me to the conclusion that a proceeding in the insolvency court is not in any proper sense an equivalent remedy, even from the standpoint of the mortgagor; but, certainly, the interests of the bondholders, acquired upon the faith of a lien enforceable in a forum of their own selection and possessing full equity powers, require that the suit to foreclose should be unembarrassed by extraneous considerations.

I am satisfied also that this court has acquired, and is entitled to exercise jurisdiction in the premises exclusive of the insolvency court. Without going beyond the ground indicated in the maxim, *Prior in tempore, potior est in jure*, is clearly established, as a fact in the case, that this peti-

tion was filed and a summons issued an appreciable period of time—about a quarter of an hour—before the deed of assignment was filed.

It is settled that the jurisdiction of the court over the cause attaches when the action is commenced (33 O. S., 523), provided of course that service be actually made within sixty days (Rev. Stat., 4988).

As I have already indicated, in a suit of this nature the control of the *res* is a primary and necessary incident of the jurisdiction; consequently, no other tribunal can acquire an adverse control after suit is begun. There can be no doubt, upon the facts here, that this court had actually acquired jurisdiction before the deed of assignment was filed, in the manner and by the means established by law. The case is therefore governed on this point by Section 4134 R. S., and by Section 6351 R. S. (as amended 1898).

In the limited time at my disposal, it is of course impossible to present here an analysis of the arguments delivered at the hearing, which, I desire to say, were exceedingly helpful to the court by reason of their clearness and force, due to the great ability of counsel and the careful preparation on both sides.

The broad considerations that influence me here, constrain me also in the same direction for another reason, namely, a recognition of the duty which the court owes to its own dignity to maintain and enforce its own jurisdiction for the public good. The prosperity and well-being of the community demands a just and consistent administration of the law without fear or favor; and especially demands the utmost good faith on the part of courts to enforce remedies according to the established methods, no less than of litigants who make contracts with reference to those remedies.

My conviction is clear that justice to all parties requires that this court should assume and exercise full jurisdiction in the premises.

The motion for the appointment of a receiver will be granted; counsel will be given an opportunity to agree upon a suitable party to be approved by the court, in default of

which, the court will select; and the assignee will be made a party defendant.

Motion granted.

Thos. H. Kelly, Drausin Wulsin, J. H. Bromwell and John C. Healy, for the Union Savings Bank & Trust Co.

C. B. Matthews and John C. Rogers, for the Pike Building Co.

GUSTAV TAFEL, EXECUTOR, v. EUGENE L. LEWIS, AUDITOR, ETC.*

The situs of personal property belonging to a decedent, and in the hands of his executor, is the residence of the executor.

HOSEA, J.

Heard on demurrer to petition.

The question raised by the demurrer is whether bonds held in this city at decease by a non-resident are taxable in the hands of the executor appointed by the Hamilton County Probate Court, and a resident of Cincinnati. Revised Statutes, Sections 2734 and 2735, require an executor to list the property of decedent as he would if it were his own (except that his trust, character and ownership must be specified), and provides that personal property shall be listed in the township, city or village where the owner resides, or where it is situated.

Clearly, this property, if owned by the executor in his own right, must be listed here; and being an executor, and the property being in possession and administered here, it is the duty of the excutor to so list it.

This is clearly discussed and settled upon the authorities by the Circuit Court of Erie County in 6th C. C. Rep., 452,

* Affirmed by Supreme Court, 75 St., —.

Hawk et al, Executors, v. Bon, Auditor. The court there deduce and declare the general principle to be, that where the persons assessed are not the absolute owners of property, but trustees, the test is the situs of the property itself.

In 39 O. St., 506, *Grant v. Jones*, our Supreme Court specifically determines the same point, holding that bonds, etc., are taxable, if held by residents whether for themselves, or in a representative capacity, and uses this language:

"Our statute clearly adopts the rule that whenever the person holding such chose in action resides in Ohio he must list for taxation such credits whether he holds them as owner, guardian, trustee or agent. If they are held within the state in either capacity they are within the jurisdiction of the state for purposes of taxation."

To the same effect is the decision in 48 O. St., 648, the third syllabus of which is as follows:

"For the purpose of taxation, the domicile of the administrator is the legal situs of the credits belonging to the estate, and it is his duty to list them in the township, city or village in which he resides."

The authorities simply confirm what seems to me the plain meaning of the statute, based upon a fundamental reason, namely, that, as property would be worthless except for the protection of the laws and the machinery for their enforcement existing where the property is actually situated and dealt with, it is but right that it should pay its proportion of the cost involved in such protection.

In this case, where the owner has departed this life, and his representative is actually administering his estate in this jurisdiction, and receiving the especial benefit of the laws preserving and distributing the property to the objects of his bounty, there are additional and strong reasons why it should pay the tax.

The objection urged by the plaintiff in argument, that the property is also being taxed in Germany, is not supported by averments in the petition; but if it were, it would make no difference in the result here, for obvious reasons; moreover, the point is practically disposed of in the case in 6 Circuit Court above cited.

I have carefully read and considered the brief and authorities of the plaintiff to the contrary of the views here expressed; but not only do the Ohio authorities cited seem to me conclusive, but the law itself, read in the light of its general policy, seems to me equally so.

Demurrer sustained; and as the demurrer practically involves the only question in the case, judgment of dismissal may be entered to the action.

Tafel & Schott, for the demurrer.

Ampt, Ireton & Collins, contra.

L. D. OLIVER v. THE CINCINNATI, COLUMBUS & WOOSTER
TURNPIKE COMPANY.*

It is the privilege and duty of an incorporated company when it has reason to and does believe a transfer of stock to be illegal, to refuse record upon the books until judicially determined; but it so acts at its peril, and must be justified, if at all, by the result of the judicial inquiry.

HOSEA, J.

The facts of this case material to the issue are as follows:

On December 29, 1891, Mrs. Sarah J. Lewis, through her attorney, R. H. Langdale, loaned to Charles F. Stites \$1,000, evidenced by a six months' note, and upon a renewal of the note at maturity, Stites delivered to Langdale a certificate for forty-four shares of the capital stock of the defendant company as security, together with other collaterals, including a note of one Bassett for \$350.

The note and collaterals remained with Langdale until January 5, 1899, when the note was sold by Langdale for Mrs. Lewis to W. N. Stites for \$75, and the note and collaterals delivered, interest due on the note having been paid and the principal reduced to about that sum by various payments from time to time.

* Affirmed by Supreme Court, 74 O. St., 386.

It appears that in the original delivery of the stock to Langdale as collateral on the note to Mrs. Lewis, no endorsement was made by Charles F. Stites upon the certificate, and neither of these parties could explain whether a separate power of attorney was given or whether the want of endorsement was an oversight. Nor was any endorsement made upon the certificate when transferred to W. N. Stites; but, on July 5, 1902, W. N. Stites sold to Oliver, the plaintiff, forty shares of the stock, and on that date, Charles F. Stites endorsed upon the back of the certificate authority to the secretary of the company to make transfers on the books accordingly—forty shares to Oliver and four shares to W. N. Stites. Upon Oliver's demand to have his forty shares transferred and issued, the company, by its secretary, refused upon the grounds following, alleged in its answer, which it pleads in justification, namely:

That on April 7, 1897, Charles F. Stites, being then the owner of said stock, made a deed of assignment for the benefit of creditors to Frank S. Hastings, whereby said stock became the property of said Hastings in trust for creditors, and was appraised and inventoried as part of the assets of Charles F. Stites; that said Hastings died before the estate was fully administered, and was succeeded by A. E. Painter as trustee, and that said stock was not publicly sold by Hastings and is now the property of Painter, trustee (although Painter himself makes no claim).

It is in evidence that Charles F. Stites paid over the money for the purchase of his note, and received the collaterals from Langdale, acting as agent for his son, W. N. Stites, who furnished the money; and Langdale testifies that he so understood the transaction at the time. The stock was sold to Oliver by W. N. Stites, through B. H. Stites, attorney (a brother of W. N. and son of Charles F.), who made delivery to Oliver in his brother's behalf; and the endorsement by Charles F. was made at that time. B. H. Stites testifies that he told the assignee, Hastings, of the stock pledged in Langdale's hands as collateral, and also of the purchase of the note and stock by his brother W. N.

Hastings, assignee, died in 1901, and upon the appoint-

ment of Painter as his successor, witness advised him of these transactions, and Painter made no claim of ownership. Witness also testified that he acted as one of the attorneys for the assigned estate, and that Hastings proposed to surrender all claim against the stock in the hands of W. N. Stites in consideration of a cash payment of \$10, the surrender and cancellation of the C. F. Stites note and the Bassett collateral note, all of which was done; and upon delivery of these notes and the cash payment, the assignee, Hastings, gave a written receipt for the notes and cash a consideration for the sale of all interest in the forty-four shares to W. N. Stites, which receipt signed by Hastings is in evidence.

The inventory and appraisal of the estate filed in the insolvency court, May 28, 1897, show real estate, \$96,795, and personal estate (including the forty-four shares of stock of the C. C. & W. Turnpike Co., appraised at \$396), \$657—a total of \$97,452—while the schedule of debts and liabilities (including a debt to Mrs. Sarah J. Lewis of \$229 and another of \$2,000) aggregates \$53,057.89.

An account filed by Hastings, assignee, February 13, 1901, and confirmed March, 1901, shows a credit to W. N. Stites of \$10 cash received, which corresponds with the assignee's receipt to W. N. Stites and must be taken as relating to the sale of the stock in question.

The contention in the case centers upon the legal status of the stock represented by the certificate delivered by Charles F. Stites to Langdale as collateral security for the note to Mrs. Lewis. The defendant company claims that by delivery of the unendorsed certificate, the transaction amounted at most to a mere mortgage, and that the *title* to the stock passed to Hastings, the assignee; and consequently Oliver derived no valid title, inasmuch as there was no *public* sale by the assignee. The proposition rests upon the essential difference between a "pledge" and a "mortgage," in that a pledge passes title, and the mortgage does not; that is to say, to constitute a valid pledge, the possession must actually pass out of the pledgor, while in the case of a mortgage it need not.

There is some confusion in the decisions along these lines, with respect to "stock," which is an intangible and undivided proprietary interest in property, and chattel property itself which is tangible. In the latter case, possession of the *corpus* is *prima facie* evidence of title because it is visible and tangible; while the former must necessarily rest upon something else as a token of the ownership, to-wit, a paper certificate of the trustee or custodian, which must, upon transfer, carry with it some evidence of intention.

The books generally agree that a certificate of stock possesses some of the legal attributes of a note drawn to order; and a note or bond payable to order may be transferred without indorsement, the transferee taking thereby an equitable title. Daniel on Neg. Instr., 664a.

"If by mistake, accident or fraud, a note has been omitted to be endorsed upon transfer, where it was intended that it should be, the party may be compelled by a court of equity to make the endorsements, and in case of death, the executor will be compellable to make it. The assignee of a bankrupt, under like circumstances, may be compelled to make endorsement of a note transferred before bankruptcy." Story on Prom. Notes, 120.

It is the prerogative and duty of a court of equity to look through the forms of transactions to the substance. The testimony here clearly shows that in delivering the certificate of stock to Langdale, it was the intention of Charles F. Stites to make a valid pledge of the stock represented thereby. Whether a separate power was given with it, and subsequently lost, or the endorsement of the certificate omitted by mere oversight, neither Stites nor Langdale can now remember; but the fact appears that both supposed it was properly transferred, and dealt with it accordingly through many years without discovering any error. In fact, the testimony leads to the conclusion that the discovery was made only when the stock was sold to Oliver, the present plaintiff, when the endorsement being called for was made by Charles F. Stites.

It is also in evidence, inferentially at least, that Hastings, the assignee, shared the same impression, as appears from

his mode of dealing with the stock, and particularly from his receipt, which is as follows:

"MARCH 31, 1900.

"Received of W. N. Stites, ten dollars (\$10), balance from sale of forty-four (44) of Cincinnati, Columbus & Wooster Turnpike Company's stock, after payment of a certain promissory note given by Charles F. Stites, to Sarah J. Lewis for one thousand dollars (\$1,000), dated June 9, 1902, and subsequently purchased by W. N. Stites, for the payment of which said stock was held, together with a note given by C. F. Bassett to Charles F. Stites for three hundred and fifty dollars (\$350) as collateral security. Said notes have been surrendered to the undersigned.

"F. S. HASTINGS, *Assignee.*"

The stock certificate was never in the hands of the assignee; and it is in evidence that he knew of its possession by Langdale at and from the date of the assignment; so that the fact of placing the stock in his inventory and appraisal must be taken as a memorandum not inconsistent with his belief that he acquired as assignee merely the residual right of a pledgor; and such unquestionably was the limit of his interest as assignee.

Under these circumstances, the transfer of the certificate to Langdale, carried a title which a court of equity could recognize and enforce by compelling the assignee to complete by endorsement. But the assignee could be compelled, simply because of the obligation that rested upon Stites. The endorsement, subsequently made by Stites, carried with it no new title, but was simply the formal completion of the old, the mere clerical correction of a mistake. The assignment of residual rights for benefit of creditors did not deprive the assignee of the power to correct a mere mistake; and in the ultimate approval and concurrence by the assignee, there was no wrong done to creditors.

The assignee had a right to confirm the pledgor's waiver and assent to the sale to W. N. Stites, particularly as he evidently regarded the surrender of the Lewis note, and the

Bassett note, together with the cash payment, as a fair consideration in behalf of creditors for the release of claims on his part. 22d Mont., 354, *Thompson Co. v. Durfee*.

Whatever may have been the formal irregularities of these transactions, no fraudulent purpose appears, and the sale of the collateral after maturity of the debt, though not public, undoubtedly carried a title that could only be impeached by the pledgor or his assignee; and the subsequent waiver by both the parties cured any defect arising out of want of notice. The sale by Langdale was a good transfer of title subject to the pledgor's rights. 81 Ala., 318, *Brent v. Miller*.

And the subsequent waiver by the pledgor, his assignee, was in effect a valid ratification. 58 O. St., 598, *Glidden v. Bank*; 123 Cal., 172, *George v. Pierce*.

To the same effect, in principle, see 11 Bull., 72; 26 O. St., 638; 52 O. St., 499; *Jelke v. Goldsmith's Adm'r*; 94 U. S., 739, *Jerome v. McCarter*; 2 N. Y. 443, *Wilson v. Little*; 37 O. St., 208, *Dayton Bank v. Merchants Bank*.

The case of *George v. Pierce*, 123 Cal., 172, is instructive in connection, as showing that an assignee for the benefit of creditors stands in the shoes of the pledgor, and can not rightfully take possession of pledged property, if the rights of pledgee can not be questioned by pledgor, that is to say, that the assignee can not attack the sufficiency of the transfer to pledgee if the pledgor could not.

The case also holds, substantially, that actual and continued change of possession of the subject of pledge is sufficient as against creditors of pledgor. In brief, as against them, the open and visible custody of property is sufficient to sustain the validity of the pledge. See also: 2d Story's Eq., 1047; 4 N. P., 218, *Lawler v. Kell, Ex.*, 21 O. S., 221; *National Bank v. Railway*; Jones on Pledges, etc., Section 423.

Undoubtedly it is the privilege and duty of a corporate company where not satisfied of the legality of a transfer to refuse to make it upon the books until the matter is judicially determined. It also acts at its peril, and must be justified, if at all, by the result.

In the present case, I am satisfied that Oliver (and, incidentally, W. N. Stites) acquired a good title to the stock in controversy, and are entitled to the relief demanded, and decree will be entered accordingly.

Decree for plaintiff; each party, under the circumstances of the case, to pay his own costs.

Burch & Johnson, for Oliver.

Harmon, Colston, Goldsmith & Hoadly, for Turnpike Company.

STATE OF OHIO, EX REL WILSON, COUNTY SOLICITOR, v.
JOHN H. GIBSON, TREASURER, ET AL.

1. The act of November 14, 1902, authorizing a contract between the county treasurer and an outside party for the collection of forfeited taxes and assessments, and the contracts made thereunder between the county treasurer and Wm. F. Chambers, are not invalid because the said contractor is a county officer not elected by the people, nor because it extends beyond the term of the treasurer making it, nor because it invests the contractor with sole authority to collect forfeited taxes, nor because the collection of these taxes is farmed out to an individual, nor because the money for the payment of the obligation is not in the treasury nor properly certified by the auditor.
2. But the law confines the scope of such a contract explicitly to forfeited taxes for the years prior to 1899, and the contract in question violates this provision in that it permits the contractor to include current taxes accruing subsequently year by year.

HOSEA, J.

The amended petition alleges the making of a contract on or about November 14, 1902, by the county treasurer of Hamilton county, with William F. Chambers, as follows:

"COUNTY TREASURER'S OFFICE,

"HAMILTON COUNTY, OHIO.

"This article of agreement entered into at Cincinnati, Ohio, this 14th day of November, 1902, by and between

John H. Gibson, as treasurer of Hamilton county, Ohio, acting by and under authority vested in him under Section 1104 of the Revised Statutes of Ohio, as party of the first part, and William F. Chambers, party of the second part, witnesseth:

"1. That said party of the second part is hereby employed by the party of the first part in accordance with said Section 1104 of the Revised Statutes of Ohio, to collect the forfeited taxes and assessments in the county of Hamilton and state of Ohio, to the full extent of the authority granted by said section.

"2. The term of said employment shall be for a period of two years from the final approval of this agreement, as hereinafter provided.

"3. The party of the second part shall receive for the services rendered by him under the contract compensation of twenty-five (25) per centum of the amount collected by him under this contract, the same to be paid from said amount collected as may be provided by law.

"4. All expenses connected with the collection of said taxes and assessments shall be borne by the party of the second part and said compensation of twenty-five (25) per centum of the amount collected and paid into the treasury by said party as hereinbefore provided, shall be in full for all services rendered by him and for all sums expended by him in the performance of this contract.

"5. This contract shall be subject to the approval of the board of county commissioners of Hamilton county, Ohio, and subject to the further approval as to municipal assessments by the legislative body of any municipality in said city interested in such municipal assessments.

"In witness whereof, the said parties acting as hereinbefore set forth, have hereunto set their hands on the day and year hereinbefore mentioned in duplicate, one to be retained by each party.

"JOHN H. GIBSON,

"Treasurer of Hamilton County, Ohio.

"WILLIAM F. CHAMBERS.

"Approved November 15, 1902.

"CHRISTIAN BARDES,

"WM. A. BLAIR, and

"C. C. RICHARDSON,

"County Commissioners of Hamilton County, Ohio.

"[COUNTY COMMISSIONERS' SEAL.]"

It is alleged that this contract was made under the act of 1902 (R. S., 1104), and that this law is invalid; but assuming the law to be valid, the contract goes beyond the intended scope of the law in terms and in the practical construction given it by the parties to it; and the court is asked, alternately, to enjoin all acts and payments under it as illegal; or to construe the contract and enjoin all unauthorized acts under it.

The answer admits the contract; but upholds both the validity of the law and the contract, and denies any improper construction of, or operations under, the contract.

Objection is made to the validity of the law in question, under Sections 1 and 2, Article X, of the Constitution, which provide in substance that county officers shall be elected by the people; and the objection proceeds upon the theory that the act in question makes the contractor under it a "county officer," and does not provide for his election.

A counter objection might be made that injunction will not lie against a public officer alleged to hold under an unconstitutional law (21 C. C., *State, ex rel, v. Craig et al*; affirmed in 64 O. S., 588).

Waiving this point, the act of 1902 (95 O. L., 95) provides that "the county treasurer shall have power to contract with a suitable person or persons to collect any such delinquent or forfeited taxes * * * and the person or persons contracting shall have the right to proceed under this section in the collection of said taxes and assessments or as otherwise provided by law."

The procedure contemplated by the act is a civil action, described and defined as a remedy given the treasurer "in addition to all other remedies provided by law." The authority to contract follows immediately after, as a part

of the same recital. That is to say, the act formulates procedure at law that may, and if requested by the state auditor, must be followed by the treasurer in the collection of delinquent and forfeited taxes; and in immediate connection therewith, authorizes the employment of a contractor in a certain part of the work.

The Constitution of Ohio contemplates three classes of public servants, viz.: an "officer" (properly so-called), a "public agent" and a "contractor" (Art. II., Sec. 29). I have had occasion to distinguish between these, in the case of *Burch v. Harte*, decided at the present term, and upon general considerations there seems to be no reason why the contractor provided for in this act should be regarded as a "county officer." He is a mere agent of the treasurer in the performance of a duty, in which special assistance of this character is appropriately employed, and indeed is indispensable. Such agent has no independent function, but is a personal representative of the treasurer and acts in his name. He stands in the relation of any other employee connected with a public office, who performs duties that, in a sense, are public and absolutely necessary to the administration of public business, yet do not carry with them the responsibilities chargeable upon a public officer.

The case of *Game Wardens*, 61 O. St., 171, *State, ex rel, v. Halliday*, presented very different conditions, to-wit: A statute conferring upon game wardens the independent powers of justices of the peace, peace officers, with power to arrest, seize property, etc., and having, as the court found, "an independent capacity clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law.

Mere assistants employed in public business are not public officers, but the agent or contractors contemplated by our Constitution (25 O. S., 21—Deputy Clerk Probate court; 57 O. St., 415—Fireman; 52 O. S., 346—Jury Commissioners; 61 O. St., 171—Clerk in Pension Office; 48 O. St., 142—Tax Inquisitor).

It is clear that the act in question does not contemplate

the appointment of a county officer, and is not, therefore, repugnant to the Constitution.

The second objection, namely, that the contract is invalid because it extends beyond the term of the treasurer making it, together with the next, to-wit, that the treasurer has no power to make such a contract for any definite term, will be considered later on.

The fourth objection, namely, that the contract invests the contractor, Chambers, with "sole authority" to collect forfeited taxes and prosecute suits in the name of the treasurer, and is therefore against public policy and void, is partially answered by the representative capacity of the contractor as the assistant of the treasurer; but is more fully covered by the ruling of the Supreme Court in an analogous case upon the contract-appointment of a tax inquisitor, reported in 48 O. St., 142, *State, ex rel, v. Crites, Auditor*. The court there says:

"To hold that the Constitution prohibits the Legislature to authorize the officers of the state or county to employ persons to assist in adding to the tax duplicate property unlawfully omitted therefrom, is entirely too narrow a construction of that instrument. The statute (85 O. L., 170) relating to the employment of a person to ascertain and furnish the auditor information as to omitted property, in order to get it upon the duplicate, must be regarded as a part of the general plan by which the constitutional rule that all property subject to taxation is to be equally taxed may be enforced, and therefore all contracts made in accordance with its provisions, legal and valid."

The close application of the above language to the case at bar will be obvious when it is considered that the collection of delinquent and forfeited taxes must necessarily tend to the equal and fair distribution of the burdens of taxation in precisely the same manner as does the bringing upon the tax duplicate that which by mistake or fraud has been omitted therefrom.

The fifth objection is, that under the contract the collection of forfeited taxes, etc., is farmed out to an individual, and that the payment to him of the percentage of

taxes collected as compensation under the contract is a gross misapplication of the public funds.

But this objection is also very fully considered by our Supreme Court in the case last above mentioned, where the contract provided in a similar manner for a compensation of "twenty per cent. of the amount secured to the public," that is, of the taxes recovered upon omitted property brought upon the duplicate. On this point the court says (p. 170):

"This contract is claimed to divert the public funds from their proper objects, and is therefore illegal. The claim is not well founded. The contract violates no statute of the state. On the contrary, it is a contract expressly authorized by an act of the Legislature, passed in 1888, to secure fuller and better returns from taxation. Nor is it a diversion of the public funds; but is rather a mode of compensating services actually performed for the public; and, to quicken the energies of the servant, this compensation is made to depend on the efficiency of his services."

The sixth objection to the validity of the contract is, that the money for the payment of the obligation thereby incurred was not in the treasury, or properly certified by the auditor at the time of making the contract as required by Section 2834*b*, Revised Statutes, nor had an estimate been made and a fund set apart as provided by Sections 1007 to 1009, inclusive (94 O. L., 76).

It is a sufficient answer to note that the contract in question was authorized by an act later in date than those cited, which, according to well-established principles, must prevail for the purpose, and in the instances contemplated by the later law, over prior statutes that may be incompatible therewith (*City v. Holmes et al*, 58 O. S., 104).

Concluding this branch of the case, there seems to be no tenable ground for holding the act or the contract in question invalid for any of the reasons cited. The act pertains to a branch of the administrative power of the state peculiarly within the province of the Legislature, free from any inhibitions of the Constitution, and its gen-

eral principles and purposes have been upheld by the highest judicial tribunal of the state.

We come now to examine more particularly the limitations of the law in question upon the contract, and also the operations under it.

The contract is drawn under the following clauses of the act in question:

"The auditor may place upon a separate duplicate the forfeited and delinquent taxes and assessments for the years prior to 1899, upon the request of the treasurer, and the validity and priority of lien of such taxes and assessments shall not be affected thereby; and the county treasurer shall have power to contract with suitable person or persons to collect any such delinquent or forfeited taxes or assessments at a compensation which may be deemed just and proper, subject to the approval of the county commissioners, but in no case to exceed twenty-five (25) per cent. of the amount collected, the expense of collection under such contract to be borne by such person or persons contracting," etc.

The clause authorizing the contract has manifest reference to that which immediately precedes, namely:

"Forfeited and delinquent taxes and assessments for the years prior to 1899."

This will clearly appear from the following considerations:

(1) The entire preceding part of the section has relation to a different subject-matter, namely: Suits to be brought by the treasurer to collect unpaid taxes or assessments, including "any special duplicate of delinquent or forfeited taxes or assessments," and prescribing details of such proceedings. This subject comes to a natural ending in the phrase "and the court shall make such order for the payment of costs as shall be deemed equitable and proper."

Immediately following this, and without any connecting word, comes the new subject of the taxes for the years prior to 1899, introduced by the phrase "the auditor may place upon a separate duplicate," etc.

The clause authorizing a contract for the collection of

"any such delinquent or forfeited taxes," follows the latter clause, but is connected with it by the conjunctive conjunction "and," thus clearly indicating an intended connection. This relationship with what immediately precedes would be plain enough, if the sentences were properly punctuated to accord with the ideas expressed; in which case, the entire portion of the section relating to this subject, beginning with "the auditor may place," would follow a period, and begin with a capital. But notwithstanding the manifest defects of punctuation which abound throughout the act, it is clear, both by grammatical rules, and by the relationship of ideas, that the words "any such delinquent or forfeited taxes" (for the collection of which the treasurer may contract), refer only to those of the years prior to 1899, which at the request of the treasurer might be placed upon a separate duplicate, apparently for the purpose of the contract.

(2) This view is confirmed by reference to the section of which the present act is an amendment. There the phrasing is the same, excepting that 1879 is referred to instead of 1899; and, after providing for making a separate duplicate without affecting the validity and priority of lien of such taxes, it provides, that, in certain counties, the prosecuting attorney was to enforce the lien of forfeited taxes for years prior to 1879, and the present amendment merely substitutes for the prosecuting attorney another agency, namely, a contractor, to be selected by the treasurer, and changes the date from 1879 to 1899. The entire sequence of words and ideas remains substantially the same in the amendment, except as I have indicated. The added word "any," before "such," therefore, is of little significance, and can not possibly operate to carry back the relationship to the general delinquent or forfeited taxes provided for earlier in the section. It is as though the wording had been, "if there be any," *i. e.*, forfeited taxes, prior to 1899; or, it may have been intended to imply power in the treasurer to select those which he wished to contract for of those prior to 1899.

(3) The same results follow a consideration of the

history of the statute. It was first introduced in 1874 (71 O. L., 82) for the purpose of giving the treasurer, in addition to other remedies provided by law, power to collect taxes by a simplified civil action of a summary nature. By subsequent amendments, this was made to include any taxes carried upon a special duplicate; delinquent and forfeited taxes, and finally, municipal assessments; and in 1880, was added the provision relating to forfeited taxes for years prior to 1879, with the special provision for their collection by the prosecuting attorney. The amendment of 1902, in this respect, simply altered the date to 1899, and substituted for the prosecuting attorney a contractor.

In all this, the evident purpose of the statute, as expressed in its earlier paragraphs, has remained unchanged, namely, to clothe the treasurer with new powers to collect all taxes so far as they can be collected, by modes of procedure prescribed, but with the addition of special means in the case of stale forfeitures based upon more liberal compensation to an individual contractor stimulated by self-interest to diligent effort. The only alternative construction would be to hold that the treasurer, under this act, could contract for all that the act specifies, viz., "any taxes or assessments * * * charged * * * upon the general or any special duplicate * * * for any purpose authorized by law * * * not paid within the time prescribed by law"—which savors strongly of the *reductio ad absurdum*.

I hold, therefore, that under the act in question, a valid contract can be made only for the delinquent and forfeited taxes and assessments for the years prior to 1899; that is to say, taxes accruing in 1898, and years prior thereto, which became delinquent and forfeited, and which the treasurer had failed to collect, by the ordinary means at his command, or as prescribed in the act, up to the date of the contract.

We come now to consider whether the contract as drawn, falls within the authority of the statute as thus defined,

and, if yea, whether the practical construction given to it by the parties accords therewith.

The first clause of the contract defines its scope, and is as follows:

"(1) The said party of the second part is hereby employed by the party of the first part in accordance with said Section 1104 of the Revised Statutes of Ohio, to collect the forfeited taxes and assessments in the county of Hamilton and state of Ohio to the full extent of authority granted by said section."

It must be admitted that this method of drafting municipal contracts without further definition of the powers and duties of the contractor under it, is not to be commended for the reason, among others, that it may lead to friction and even litigation in determining its true scope as between conflicting views of the law entertained by the parties to it. Public contracts, of whatever nature, should be explicit; and it is the duty of public officers as representing the public, to make them so.

In the present case, the contract may be saved from failure through indefiniteness by applying the principle "*id certum est, quod reddi certum potest*" and defined by reference to the statute as providing for the collection of only the delinquent and forfeited taxes and assessments for the years prior to 1899, and consequently as within the scope and intent of the law as hereinbefore defined.

But the testimony adduced at the hearing shows that such is not the practical construction given it. From the statutes and the practice of the treasurer's office, as shown in evidence, a forfeited tax list is made every two years. The taxes for a given year become a lien on real estate in April and the auditor is required (Revised Statutes, Sections 1034 to 1042, inclusive) to make a tax list and deliver a true copy or "duplicate" thereof to the treasurer on or before October 1. This tax is payable one-half in December of the same year, and the remaining half in June of the following year. If not paid, the treasurer may collect by distress, with five per centum as penalty, which is retained by the treasurer as compensation (Re-

vised Statutes, Section 1094). Semi-annual settlements are had between the auditor and treasurer, in August and February; and at each August settlement, the auditor is required to take from the duplicate of the previous October, a list of all taxes which the treasurer has been unable to collect, and record the same, together with the taxes and penalty previously due, and also those of the current year (Revised Statutes, Section 1046), and to forward an abstract of this delinquent list to the auditor of state (Revised Statutes, Section 1053), and enter them on the duplicate of next year with accumulated taxes and penalties charged.

After the semi-annual settlement with the auditor, the treasurer is authorized to take a rule in the common pleas against the owner, where he has been unable to collect by distress, and this rule, when made absolute, has the force and effect of a judgment (Revised Statutes, Section 1097).

By further provisions of law, property delinquent at the August settlement is advertised for sale, and such as is not sold, is placed on the forfeited list; and this again advertised and offered for sale once in two years.

These various proceedings, and the additional proceedings contemplated by Section 1104, constitute a sifting process in which the treasurer is the active agent, and results, or should result, in the collection of all but a comparatively small residue of uncollected taxes which require special knowledge and diligence to reach and bring in and for which the contract here in question is provided.

But the testimony shows that the contractor is proceeding to collect upon the forfeited tax list of 1902 as ascertained and listed at the August settlement of 1901; that is to say, taxes originally accruing for the year 1900 and years prior thereto.

It is also shown that the contractor is permitted to include the current taxes accruing subsequently year by year. This is clearly beyond the scope and intent of the law, which confines it explicitly to the forfeited taxes of

years prior to 1899. The case of *The Commissioners of Hamilton County v. Arnold*, in 65 O. S., 479, is instructive in point of principle:

"Statutes enacted for the protection of the public revenues," say the court, "are usually not merely directory, but mandatory. * * * Each delinquent list must be read, and an employment made to collect the same, but there can be no employment of the collector to collect future lists. * * * His employment is to collect the delinquent list which has been read, or some part thereof, and when that is done his employment ends."

A public contract, in other words, must be explicit, and it is the duty of public officers, representing the public (which is the real party to the contract), not only to make the contract clear and explicit in the first instance, but to see that the contractor keeps clearly within its proper bounds. The principle of the case is that the contract must explicitly refer and be limited to a subject-matter already existing when the contract is made, and can not be stretched to include what may subsequently arise.

There remains now to be considered the clause fixing the term of employment at two years.

In the county commissioners' case cited above, the Supreme Court says:

"The employment of such collectors can not be turned into an office to be held to the end of the treasurer's term, or for any definite period. His employment is to collect the delinquent list which has been read, or some part thereof, and when that is done, his employment ends."

In other words, the authority given by law has reference to a certain thing to be done—specified work to be performed—and not for continuing services. In the present case, however, the contract, referring directly to the law for its definition, is held to be for a specific thing contemplated by the law; and the time clause must be construed merely as a limitation of time and not as a "term of employment;" that is to say, the contractor, being authorized to collect certain specific taxes, must do the work

within a certain time. The fact that the period thus designated overlaps the term of the treasurer, is not material, under prior decisions of this court.

In conclusion, therefore, I must hold the second cause of action to be maintained. The judgment will be for the plaintiff upon the second cause of action.

The injunction order now in force will be modified to accord with this opinion and be made thereafter perpetual.

Judgment for plaintiff with costs.

F. C. Ampt, G. C. Wilson and O. B. Jones, for relator.
Frank F. Dinsmore, contra.

MARY GUIN v. MIRICK ET AL.

The master of a minor servant is chargeable with notice of such lack of capacity as is usual among minors of the same age to understand and appreciate the perils to which he is exposed in the course of his employment, and the burden of proving a greater capacity than this is upon the master.

HOSEA, J.

This demurrer raises the question whether in an action against an employer for injuries to an employe by reason of using a defective and consequently dangerous machine, the employe must allege that he notified the master of the facts and continued in the service on the faith of a promise that he would remedy the defects; or if defects were unknown, that they were such as could have been provided against, by exercise of ordinary care and prudence on the part of the master.

The general rule, subject to the above limitation, is that the servant, by the terms of his employment, is presumed to assume the risks of such injuries from accident as are

incident to the nature and character of the employment and against which the master could not, in the exercise of ordinary care, have protected him.

In the present case, the negligence alleged was the failure to provide a proper guard, as part of a machine, which guard is commonly employed on such machines. Presumably, therefore, the defect was visible, and known to both employe and employer; and, ordinarily, therefore, there could be no recovery unless the employer promised to remedy the existing defect, on the faith of which promise the employe continued to use the machine. 49 O. S., 598.

But in this case, it is averred that the employe was of "*young and immature years, and this fact was known to the employer;*" and this, in effect, presents an allegation that the negligence of the employer consisted in putting the minor servant to work at a dangerous and defective machine knowing it to be such; and the question would be whether the servant knew of the defect; that is, whether the youth and immaturity of the plaintiff—who sues by her next friend—was such that she was not capable of knowing or appreciating the dangerous condition.

It is well settled that the rule limiting the liability of masters applies to minor servants. That is to say, that the mere fact of minority will not vary the rule, if the minor had capacity to take care of himself, and knows and can properly appreciate the risk. But it is also settled that incapacity of a minor to understand and appreciate the perils to which he is exposed by the employment, even if he nominally knew them—if they were such that a right-minded person would not have allowed him to be exposed to—constitutes an exception to the rule.

The master of a minor servant is chargeable with notice of such lack of capacity as is usual among minors of the same age, if his age is or ought to be known to the employer; and the burden of proving a greater capacity than this is upon the master. (Sherman & Redfield on Negligence, Section 218.)

The only doubt in this case arises from the fact that the allegation is confined to the fact of minority, except that the expressions used imply an immaturity of years, which implies corresponding want of capacity. While a fuller statement would have been desirable, as a matter of pleading, it may be held by fair intendment to tender an issue.

Demurrer overruled.

Chas. L. Hopping, for the demurrer.

Bates & Meyer, contra.

THE UNION SAVINGS BANK & TRUST COMPANY v. KATE
W. CAMPBELL ET AL.

In a partition suit the jurisdiction of the common pleas attaches to the property for purposes of partition only, subject to liens; and the question of liens being incidental, the partition proceeding is not a bar to a suit to foreclose a mortgage on the property.

HOSEA, J.

Heard on demurrer to answer.

The petition was filed March, 1903, to foreclose mortgage of real estate given January, 1895, to secure loan for three years, on which default was made in 1898.

Euretta Cook and Sallie L. Cook answered, setting up suit in partition by these defendants in common pleas court in October, 1902—making the plaintiff and other lienholders parties, for adjustment and payment of their claims—in bar of the present suit.

This does not seem to be another action between the same parties for the same cause, as intended by the code. The difference is not technical, but substantial. A mortgage lienholder is entitled, by the nature and implied terms of his contract, to direct remedy instituted and con-

trolled by himself. A partition suit instituted by others—which may, for aught that appears, include other property, and which may be delayed and confused by many other questions in which he can have no interest—is not an equivalent remedy. Should the other suit reach a conclusion first, and this plaintiff be paid off, it would of course terminate his suit; but the jurisdiction of the common pleas attaches to the property for purposes of partition only, subject to liens, and the question of liens in that suit is purely incidental to the main relief. If this lien is first determined, in this suit, the other court is relieved, *pro tanto*, and can proceed with greater freedom. I do not see that any conflict of jurisdictions is involved.

Demurrer sustained.

C. K. Shunk, for the demurrer.

W. L. Granger, contra.

BRUNS V. FRANKLIN BANK ET AL.

HOSEA, J.

Motion to make petition more definite, etc.

Suit is upon two successive bonds given by the Franklin Bank and Henry Burkhold to various defendants, including the present plaintiff, in proceedings in error to the Superior Court of Cincinnati in General Term and to the Supreme Court of Ohio, to reverse a judgment of the Superior Court in Special Term, in cause No. 50080.

The motion is (1) to require plaintiff to file copies of the bonds; (2) to require him to separately state and number the several causes of action; and (3) to require plaintiff to elect between said causes of action.

The first branch of the motion is governed by Section 5085 of the Practice Code requiring that in an action * * * founded on * * * a written instrument as evidence of in-

debtedness, a copy thereof must be attached to and filed with the pleading.

The surety on a bond is liable in a secondary capacity, solely upon the bond as evidence of his indebtedness.

The reasons are obvious why, in suits on bonds, the statutory requirement cited, applies with peculiar force. The liability of a defendant depends very closely upon the exact wording of the bond, and full and exact knowledge in this regard is, therefore, necessary to the preparation of his defense.

The second branch is governed by Section 5061 of the Practice Code. A single cause of action can not be predicated upon two bonds given in successive steps of procedure. Each has its appropriate function and covers its specific part of the damage sustained. The third branch is not well taken.

The suit embraces two causes of action not repugnant or inconsistent.

Motion granted as to first and second clauses, and denied as to third.

Burch & Johnson, for the motion.

A. J. Cunningham, contra.

ALFRED M. COHEN ET AL V. HENRY A. NURRE ET AL.

HOSEA, J.

Heard on motion to make petition more definite, etc.

The motion seems to be well taken. The suit is by a receiver of a foreign corporation appointed here and proceeds upon assumptions that may be good under Ohio law in respect to Ohio Corporations, but are not necessarily so under the laws of West Virginia as to their own.

So far as appears, the suit is an original one as to these

defendants; and it is entirely proper that the receivers should be required to plead the circumstances of the previous suit in so far as may be required to clearly show the nature and extent of their authority; and also to show the legal basis of the liability of the defendants as claimed.

The parties sued here are not, apparently, the original subscribers to the stock (at least, the petition does not so allege); and it may be, that, by the laws of West Virginia, a transferee of stock for value is not liable, in place of the original subscriber, for prior debts or unpaid subscriptions. Should this be the law of West Virginia, the call upon defendants for such unpaid balance would be nugatory.

For like reasons the grounds of liability to refund dividends should be particularized.

The case is peculiar in this: That liabilities of stockholders are determined by the law of the parent state, and the receivers in this case must proceed according to those laws, to enforce such liabilities as thereby exist.

They are, to all intents, in the same relation to these defendants as if they had been appointed under proceedings in the parent state, and had come into this jurisdiction for like purposes, by comity of our tribunals.

Motion granted.

Edward J. Dempsey, for the motion.

Cohen & Mack, and *Cushing, Ireton & Busch*, contra.

JOSEPH H. DIECKMAN JR., v. THE COMMERCIAL TRIBUNE Co.

HOSEA, J.

Heard on motion to strike out.

So far as the innuendo, by the words "*that the plaintiff had been guilty of acting the role of detective and of assisting a detective agency*," seeks to convey the idea that

the article charges plaintiff with assisting a detective agency by assuming a part—that is, falsely impersonating a detective—it does not explain, but contradicts the article quoted. The article describes Dieckman as “of the Grannan Detective Agency,” which can only mean that he is a detective and a member of said agency.

The office of the innuendo is to connect the plaintiff with the article and to explain ambiguous terms. It can not be used to enlarge or prevent a meaning clearly expressed (8 Q. B., 825; 7 Q. B., 280).

The words first above quoted must be stricken out as impertinent; and it is so ordered. Motion granted in part; denied in part.

Thomas L. Michie, for plaintiff.

Pogue & Pogue, for the motion.

THE NATIONAL LAFAYETTE BANK ET AL V. GEORGE E.
SCOTT ET AL.

1. A suit by creditors of an insolvent firm to set aside a transfer made by one of the partners to his wife can not be maintained, where the petition makes no reference to prior efforts to realize upon the debt out of the partnership property, and does not allege solvency or any other fact, justifying proceedings directly against the individual property of one of the partners.
2. Partnership obligations are of a joint nature, and the taking of a judgment against one of the joint obligors operates as a discharge of the others from liability; and this is true where the debt is an unquestioned partnership liability, notwithstanding it is evidenced by the individual notes of the partners.
3. Technical responsibility of a partner for disaster to a solvent business will not be accepted as indicating a fraudulent purpose on the part of such partner in transferring his property while the business was still solvent.

HOSEA, J.

The suit is brought by creditors of the late firm of George Scott's Sons, to set aside a transfer of the family

residence property of George E. Scott, made by him to his wife on July 7, 1900, as being in fraud of the rights of creditors; and to subject said property to their claims.

The bank sues upon a debt of about \$6,000, based upon notes signed by individual partners—George E. and Samuel J. Scott—to and endorsed by the firm. It is pleaded as, and in fact is, a partnership debt; as are the claims of the Winifrede Coal Company and the Eagle White Lead Company, who are joined in the suit. The only right of action against George Scott individually, therefore, is based upon the legal liability of a partner for the firm debt.

Certain questions, therefore, suggest themselves at the outset as preliminary to the consideration of the question of fraudulency in the transfer of the property by Scott to his wife.

The petition makes no reference to any prior efforts to realize the debt out of the partnership property; nor does it allege insolvency, or any other fact that might serve to explain the omission and justify a proceeding directly against the individual property of George E. Scott as a partner; nor does it state any other fact or reason for ignoring the rule requiring a firm creditor to first exhaust the partnership assets. The present suit asks the aid of a court of equity in what is properly a supplementary proceeding against the individual partner to enforce the collection of a debt against a firm.

It is well settled that equity will not lend its aid to subject the estate of one partner to a judgment against a firm while the joint property is not exhausted; still less will it do so where it does not affirmatively appear that the proper legal steps have been taken and have failed to secure payment of the debt, or that some impediment or good reason exists for not taking such steps.

The partnership property is the proper fund for the payment of partnership debts, and must be resorted to before the separate property of partners can be reached through the agency of a court of chancery. 3 Ohio, p. 287, *Hubbell v. Perrine*; Lindley on Partnership, *p. 744, *et alia*.

What is said above applies equally to all the creditors who appear in the suit. There is another objection which applies only to the claim of the National LaFayette Bank.

It appears in testimony that the bank previously brought a suit in this court against the partnership and the individual partners, upon the identical claim presented here; and that in said suit it took a personal judgment against Samuel J. Scott, a partner, for the entire sum; that an execution was ordered, and that an order was also entered directing the sheriff to hold a certain fund in his hands, belonging to said Samuel J. Scott, subject to the order of the court in the case referred to; and this seems to be all that has been done so far.

These facts bring into operation another well-established rule of law, namely, that where a joint obligation is sued upon and a judgment taken against one of the joint obligors, such judgment operates to discharge the others from liability. This is so for the reason that the parties are bound, in law, in respect of one and the same debt; and if judgment is entered upon the debt, the claim is merged in the higher security of the judgment.

Partnership obligations are of this joint nature, and fall within this rule. *Lindley on Partnership*, *191-2, p. 255; *Shumaker on Partnership*, 342.

This principle was accepted and applied in 18 O., 307, *Sloo v. Lea*, and has been recognized in subsequent cases, to-wit: 20 O., 344-351; *Reynolds v. Stansbury et al*; 5 O. S., 34, *Clinton Bank v. Hart*; 35 O. S., 270, *Avery v. Van Sickle*; 42 O. S., 11, *Yoho v. McGovern*.

The facts that the notes constituting this debt sued upon by the bank were signed by the individual partners, makes no difference. Equity looks through the form of transactions to the substance. Not only is the debt sued upon here as a whole and as a partnership debt, but, in the other suit, circumstances are pleaded showing that the money was borrowed expressly for firm uses—the transaction being put in the form of individual notes for firm purposes. And it is also clear, from the testimony in this case of the bank president, Mr. Goodman, that the

credit was given to the firm as such, and not to the individual partners.

This debt, upon such a state of fact, is unquestionably a partnership liability and subject to all the limitations governing such liability, notwithstanding it stands upon the individual notes of partners. 33 O. S., 7, *McRee v. Hamilton*; 4 C. C., 195, *Merchants Bank v. Little*; 8 C. C., 532, *First National Bank v. Stiles*.

Under the operation of these established principles, the plaintiffs and cross-petitioners have not shown their right to maintain this suit or to have granted to them the relief sought; but in justice to all parties, I have carefully considered the main question upon a wholly independent basis, and will state my conclusions and the reasons therefor.

The law of England, whence we derive our statutes relating to conveyances in fraud of creditors, has always been severe and strictly administered. It is quite within the memory of some yet living that the principle of imprisonment for inability to pay a debt—a principle whose evils were so forcibly exposed by Dickens' touching story of Little Dorrit—has been laid aside in English jurisprudence as obsolete, in recognition of the higher considerations of the public good, excepting only where by actual and intentional fraud, a man has forfeited his right to consideration under more beneficent modern statutes and adjudications.

But even under the English decisions of a quite recent period, much of the old spirit of harshness prevails; and, influenced by these decisions, our own courts, in some instances, have felt constrained to apply rules which probably would not obtain to-day upon the same state of fact. Without dwelling further here upon the more lenient—or, at least, more discriminating—attitude of modern courts of equity (which will be found very fairly stated in Vol. 14, Am. & Eng. Encyc. of Law, p. 304), I will call attention to a few considerations that are controlling factors in their examination.

The statute upon which this suit proceeds is Section 6343 of the Revised Statutes, as amended April 26, 1898;

and relates to a conveyance or transfer made in contemplation of insolvency, or with intent to prefer one or more creditors to the exclusion of others, or with intent to hinder, delay or defraud creditors, etc.

It is an elementary principle that fraud or fraudulent intent will not be presumed. It must be pleaded and proved as a fact. But in cases of fraudulent conveyance an intent may be held to exist by force of circumstances, where perhaps no conscious purpose existed, under the rule that a man must be held to intend the natural and inevitable consequences of his acts.

Again, insolvency, in these cases, is frequently to be judged of by the after event; and, usually, if it takes place shortly after the making of the conveyance, it is, under the English authorities, sufficient proof of fraudulent intent at the time. American authorities, however, recognize an exception where a man is perfectly solvent at the time of the transfer, but is afterwards rendered insolvent through unexpected losses which could not have been reasonably reckoned on at the time of the conveyance. Bump on Fraudulent Conveyances, Section 254; 1 Bailey, 575.

And, indeed, the fair and just rule, as it seems to me, is that the inquiry should be limited to the circumstances of the grantor at the time. (Bump on Fraudulent Conveyances, Sections 263-265.) And this I understand to be the rule in Ohio. 15 O., 108, *Miller v. Wilson*.

Conveyances of this nature are frequently, however, voluntary conveyances; those made without a valuable consideration; such, for example, as a gift to a wife or child in consideration of love and affection; and, naturally, in such cases a more careful scrutiny of the facts and perhaps a somewhat more exacting enforcement of the rule is demanded. This is illustrated in the case of *Miller v. Wilson*, *supra*, where the court say (p. 114):

"It is claimed by the complainants that a voluntary conveyance, for the consideration of natural love and affection, can not be sustained, if, at the time, the grantor is involved in debt. Decisions to this effect have unques-

tionably been made in England, and probably such is the law in that country. And such seems to have been the decision of Chancellor Kent, in a case decided by him in the state of New York, 3 Johns. Ch., 481. We do not, however, conceive this to be the correct rule as generally established in this country. A man may make an advancement to his child, although at the time in debt, provided he has sufficient property remaining to satisfy such subsisting debts. And if the advancement is made under such circumstances, it can not be impeached by subsequent creditors, merely because it is voluntary. A person claiming under such advancement must be prepared, however, clearly and conclusively to show that there was other property sufficient to pay all subsisting debts."

See also 5 O. S., 121; 23 O. St., 493; 52 N. Y., Superior Court, 394.

Similar views are expressed in 2 O. S., 374, *Crumppacker v. Kugler*. And this is but an application of the principle that a man should be just before he is generous.

But there is another class of cases which do not call for the application of these stricter principles, namely: conveyances made in personal good faith to a wife upon the consideration of advances previously made to the husband, or by way of mortgage to secure a *bona fide* indebtedness to her.

In 3 N. P., 311, *German Nat. Bank v. Gunther*, a wife's advances, with interest, were protected as a lien; and in 40 O. S., 287, a mortgage given to secure a *bona fide* indebtedness to a wife was held good,—in both cases against the claims of creditors. And this rule is generally recognized. 102 N. C., 413; 78 Ala., 555; 136 Ind., 319; 84 Iowa, 598; 183 Penn., 219; 73 Mich., 101; 60 Bul., 316; 71 Ind., 459.

And the homestead allowance of \$500 may be allowed out of the proceeds, even if the conveyance is set aside. 5 O., 293; 34 O. S., 645; 41 O. S., 206.

And the wife's dower is also protected. Waite on Fraud. Cov., Section 315; 108 U. S., 66; 130 Mass., 407.

Coming now to the consideration of the actual circum-

stances attending the transfer here in question, the following seem to me the decisive facts upon the testimony adduced.

The firm of George Scott & Sons, upon the death of the elder Scott in about 1888, was succeeded by the firm of George Scott's Sons, in which a son-in-law, Waite, became a one-fourth partner. The business of a pottery had been long and successfully carried on by the elder Scott; and, upon his death, the real estate of the plant was inherited by the two sons, George E. and Samuel J. Scott, and a daughter, Mrs. Waite (in thirds). The business was large, and its capital ample and its credit good. The brother-in-law, Waite, appears to have been a disturbing factor; and soon after the date of the transfer in question, suits were brought, one by Waite to dissolve the partnership and settle its indebtedness, and the other by the Scotts to partition the real estate.

In the former suit, in July, 1900, it appeared from the books, when receivers took charge, that the assets were \$59,215.17 and the liabilities \$18,874.33; and George E. Scott is credited with \$14,804.17 capital, with a personal credit of \$1,818.38, making \$16,623.35. An inventory and statement of assets and liabilities was made in September by direction of the receivers, and showed assets of \$43,000, and liabilities of \$18,864.13; and net capital to the credit of George E. Scott of \$8,723; and this is the only tangible evidence of the actual condition up to that time.

These suits were amicable in the sense of being intended by the parties to settle their own affairs and enable them to rearrange the business upon a basis more satisfactory and harmonious as between themselves, and manifestly with no thought of wrong to creditors.

This, then, must be accepted as the condition of affairs at the time of the conveyance in dispute; and, even supposing that the intention to file these two suits existed at that time, there was then no insolvency.

The lot in dispute was bought by George Scott in 1889 from personal accumulations; and, as the building of the house progressed in the same year, the wife contributed

from money of her own—largely received from her mother—about \$2,000 to \$2,500, as testified by husband and wife. Upon cross-examination—and as requested by plaintiff's attorney—the wife brought into court a personal memorandum book showing entries as follows: At various dates in 1889, \$830 paid to the carpenter; \$75 to the stonemason; \$370 to blank; \$330 to the carpenter; and \$150 for mantels, making a total of \$1,755; and in 1896, \$150 for a furnace, making a grand total of \$1,905; and testified, in corroboration of more general statements of the husband, that these were paid for and during the construction of the house.

The husband further testified that he always regarded the house as hers, and that the yearly taxes on the same had been paid by her.

A rough calculation will show that the advances of 1889 at 6 per cent. swelled in 1900 to \$2,910.30, and that of 1896 to \$186; making a total of \$3,096.30, taking no account of the taxes, which are not detailed in the evidence. This is something more than a mere unsecured indebtedness of a wife that would place her on a par with other creditors. It was money advanced on the faith of the property itself, actual purchase money advanced under circumstances and upon such an understanding as gave her a lien in equity, at least to the extent of her advances with interest, and, in fact, made the husband her trustee of the title for her benefit.

Now in the suit of the Apollo Building Association to foreclose a mortgage made in 1900, the property was appraised at \$3,000, which is the only evidence of value of the property at a point of time near the date of the transfer.

Upon this state of facts, it being conceded that there was in the transfer no fraud actually intended, the contention of the plaintiffs must fail, unless the subsequent events prove that the favorable conditions thus shown by the testimony to exist at the time of the transfer were apparent, and not real; and that creditors were in fact actually defrauded.

The facts thus urged are:

(1) That it appears by a statement of the expert accountants, in the partnership suit, that for some years prior to 1900 the profit and loss account showed a preponderance of loss in a large sum. But this raises no inference of insolvency against the inventory of tangible assets in 1900 of \$43,000, with a total indebtedness of much less than one-half that amount, about \$18,800.

(2) That upon the receiver's sale of the partnership assets about a year and a half later, after an unsuccessful effort of the receivers to run the business, they sold the machinery for \$3,100, about one-tenth of the appraisement, and the total assets for but little over this amount, something over \$5,000 in all.

Mr. Scott testifies to the ignorance, improvidence and wastefulness of the receivers' management, and the injury to and deterioration of the machinery in their charge, as accounting for this discrepancy. But this is not a sufficient explanation.

The real explanation, apparently, is the divided ownership of the pottery real estate and buildings, and its machinery and apparatus equipment, two necessary parts of a valuable property considered as a whole, each useless and comparatively worthless when separated.

It is, perhaps, not the province of the court to comment on the apparent absence of good judgment manifested in the proceedings which led to such disastrous results, by those directly concerned in them; but it is fairly pertinent in the present connection to say that it is surprising that the creditors, who must have known of these proceedings, should have stood by and made no effort to secure their claims by preventing the sacrifice, at least upon the theory that the pottery property, as a whole, including the real estate, which had been so long used in the business, and formed the basis of its credit, was partnership property and subject to payment of their debts, under well-established doctrines.

But I do not see in this ultimately disastrous result any such connection with the conditions existing in July, 1900,

as that such results could have reasonably been anticipated by George E. Scott, or any man of ordinary business prudence. Even considering that he is technically responsible for the disaster, as a party in interest with those whose foolish acts precipitated the catastrophe, still it can not be said that it indicates any fraudulent purpose. The case of Samson may be a precedent or showing that a man may intentionally pull down a temple on himself that others may be injured; but it is beyond reason that a man would pull down the temple of his own fortunes to defraud an ordinary creditor. Therefore, I do not see that these subsequent facts alter the evident situation attending Scott's transfer to his wife in July, 1900.

Upon all the testimony in the case, and upon the law as clearly applicable thereto, I am constrained to hold that the equities of the case are with the defendants, George Scott and Sophia Scott, and judgment is rendered accordingly.

I am satisfied that the mortgage of the Apollo Building Association was made and taken in good faith, and that it should not be disturbed, as the law provides.

Maxwell & Ramsey, Dempsey & Fridman and Kelley & Follett, for plaintiffs.

J. H. Charles Smith, for defendants.

THE CINCINNATI RAILROAD OMNIBUS COMPANY V. LOUISE
E. TAHSE.

1. When a wagon is moving along the street of a city with a rope trailing behind, the law raises a presumption that it is due to the negligence of the owner or his agent, and the burden of proof is upon the defendant to remove such presumption of negligence.
2. Such presumption is not conclusive on the subject of negligence, however, and if the defendant shows by a preponderance of the testimony that it exercised the care that an ordinarily prudent person would have exercised with regard to the rope, the presumption of negligence is overthrown, and it is the duty of the jury to find for the defendant. But if the defendant does not remove this presumption by a preponderance of testimony that such care was used, then it is the duty of the jury to find the defendant guilty of negligence.
3. A charge to the jury that the plaintiff is entitled to "full compensation," instead of "reasonable compensation," is correct. *Pittsburg L. & E. R. R. Co. v. Congwahr*, 22 W. L. B. 280, 282 (affirmed by the Supreme Court), followed.

HOSEA, J.; FERRIS, J., concurs; PFLEGER, J., concurs in the result, but not fully in the reasons.

This case comes into this court from the Special Term, upon a number of assignments of error and on overwhelming list of citations in the briefs of counsel. The facts in the case are substantially as follows:

One of the defendants' wagons, in charge of a driver and employed in transferring baggage to and between the railway stations in Cincinnati, while passing along Fifth street westwardly, one evening after dark, had attached to and dragging after it upon the ground a rope about fourteen feet long, used ordinarily in tying trunks upon the wagon when piled up in quantities. People at that hour were hurrying homeward after the labors of the day; and the defendant, being momentarily detained by the wagon as it passed over the crossing at the east side of Vine street going westwardly, attempted to cross

the street immediately behind the wagon. In so doing she was caught and thrown down by the rope, which, in some way, became fastened about her ankle, and was dragged some distance, and sustained injuries of an extremely serious nature, and of a permanent character.

The petition, filed by plaintiff, alleged the circumstances above narrated and averred that she was injured by the negligence of defendant in permitting a rope to trail behind the wagon in the street. The answer was a general denial.

The charge of the court contained the following, to which exception is taken:

"When a wagon is moving along the street of a city with a rope trailing behind, the law raises a presumption that it is due to the negligence of the owner or his agent, and the burden of proof is upon the defendant to remove such presumption of negligence.

"Such presumption is not conclusive on the subject of negligence, however, and if the defendant shows you by a preponderance of the testimony that it exercised the care that an ordinarily prudent person would have exercised with regard to the rope, the presumption of negligence is overthrown and your duty is to find for the defendant. But if the defendant does not remove this presumption by a preponderance of the testimony that such care was used, then it is your duty to find the defendant guilty of negligence."

We agree with the court below that, under circumstances such as those detailed, the law raises a presumption of negligence. Negligence is a relative quality differing according to the degree of obligation as to care which an ordinarily prudent man would exercise under differing circumstances. But, as a probative fact, negligence is always an inference from facts put in evidence, as contrasted with a fact which is the subject of direct proof; and under some circumstances the facts may call for legal as distinct from logical deduction. *Railway Company v. Murphy*, 50 O. S., 135, 143.

This is well illustrated in an earlier case in which a brakeman was killed through breaking of a defective brake-

rod while in the performance of his duty. The court, toward the close of an extended discussion, says:

"Carelessness on the part of a common carrier being as material a fact as the injury received by the passenger, to authorize a recovery when both are denied, it is as incumbent on the plaintiff alleging both to prove one as well as the other. In proving the injury, the plaintiff may—and often does—prove such circumstances under which the injury was received, as raises a presumption of carelessness or negligence; and in such case the burden of disproving the presumption by explaining the circumstances so as to render their existence consistent with the absence of negligence would devolve upon the defendant." *R. R. Co. v. Webb*, 12 O. S., 475, 496.

Unquestionably, at the time and place, and under the circumstances shown in the present case, the dragging of the rope behind the wagon was an element of danger since it was a thing likely to cause injury to pedestrians. It was not a usual or necessary appendage to a wagon and consequently nothing to be looked for or avoided by passersby; and in the present case, by reason of the darkness, could not be seen. The thing that happened was a contingency so likely to occur as made it very clearly the duty of the driver in charge of the wagon to take due care not to permit the rope to drag; and particularly so, in a crowded street at night, where the danger was more imminent. The duty of one in charge under such circumstances, arises out of the maxim, *Sic utere tuo ut non alienum laedas*; and the fact that the rope did drag and did produce the injury, taken in connection with such duty, raises a presumption of carelessness or negligence because these were facts from which negligence reasonably follows and would be presumed. It is obvious that if the duty had been properly performed, the accident would not have occurred. 63 O. S., 236, 250, *R. R. Co. v. Marsh*.

But the force of the presumption was open to the defendant to rebut; and the evidence to this end being offered, it was for the jury to say whether the counter-evidence did or did not avail to this end. This was properly

presented to the jury by the charge in question; and we perceive no error therein.

The only other point urged at the hearing was as to the use of the phrase, "full compensation" instead of "reasonable compensation," in the charge. In view of *Pittsburgh, L. E. & R. Rd. Co. v. Congwahr*, 22 W. L. B., 280-283 (affirmed by the Supreme Court), the objection is not well taken.

Upon the whole record, as we find no error to the prejudice of defendant, the judgment must be affirmed; and it is so ordered.

Judgment affirmed.

Jones & James, for plaintiff in error.

R. M. Ochiltree, Albert Bettinger and J. M. Riddell, contra.

BERNARD WREDE V. CHARLES C. RICHARDSON ET AL.

The legality of public statutes can not be disproved as an issue of fact by the preponderance of evidence. The legislative record in such cases imports absolute verity; and public policy forbids that the burden of proof upon the issue of illegality, can be sustained by parol proof.

Per Curiam.

Reserved from Special Term.

For obvious reasons of public policy, it is incumbent on one who attacks the validity of a law, upon the ground that the proper steps were not taken in its passage, to show this by the legislative record. Under the Constitution, as amended, the participation of the governor necessary to give validity to laws enacted by the Legislature, is a legislative function to the extent of bringing the official record of his action within the rule of *omnia rite acta praesumuntur*, which applies with the strongest possible force to legislative records.

The record here presented affirmatively shows compliance with the Constitution, and the laws passed pursuant thereto, and imports absolute verity.

The burden of proof to show invalidity has not been sustained in this case; and can not be sustained by parol testimony. As said by the Supreme Court in the case of *Ex rel Herron v. Smith*, 44 O. St., 348 (370):

"What appears of record is certain and accessible to all, and all may with reason be held to have notice of such matters; that which rests in parol is perishable, uncertain, and in the nature of things limited to the actual knowledge of a limited number. The necessity for certainty and publicity in the laws, needs no higher reason for the exclusion of parol testimony offered to effect their authentication, than the perishable and uncertain nature of such testimony." * * *

And in the able concurring opinion of Judge Spear, it is further said (396):

"Utterly fallacious is the assumption that the legality of public statutes is to be proven as an issue of fact, and so upon a preponderance of evidence. To hold that a court may go back of a legislative journal and hear parol proof contradicting the truth of its declarations, or contradicting the equally conclusive presumptions which follow, and the presumptions of regularity which attach to it, would involve the absurdity of 'trying the validity of a statute upon the testimony of witnesses.' * * * The more one reflects upon such a proposition the more monstrous it appears, and the more peril seems involved in its application. It implies that where the existence or proceedings of a sovereign branch of the government are involved, parol evidence is the best evidence of which the nature of such a case is susceptible; it implies that records of the ordinary and appropriate character to prove public laws, or the existence and acts of official bodies, whose acts are not doubted or questioned by any other branch of the government, must, by the judiciary, be ignored, or subordinated to oral proof."

Not only do we regard these views as controlling, but

they commend themselves to our judgment as based upon the soundest principles of reason and public necessity.

It follows that the objections to the introduction of the parol testimony offered by plaintiff must be sustained, and judgment rendered for defendant dismissing the petition; and it is so ordered.

Judgment for defendant with costs.

Cohen & Mack, Rufus B. Smith, Albert Bettinger, for plaintiff.

Ireton, Collins & Schoenle, County Solicitors, Wade Ellis, Attorney-General, for the State.

GEORGE W. HARRIS V. CINCINNATI, HAMILTON AND DAYTON
RAILWAY COMPANY ET AL.

1. A creditor's right of action against stockholders to enforce their double liability does not accrue when the corporation becomes insolvent merely in the sense that its property is insufficient for the payment of its liabilities.
2. This is especially true where the insolvency is of a new corporation formed by consolidation of others to whose stockholders the double liability is invoked. *Non constat* but the old company may be solvent, while the consolidated company may be hopelessly insolvent by reason of the debts of the constituent companies.

HOSEA, J.

Demurrer to petition.

Plaintiff sues as the holder of a bond of defendant payable in 1942, in the sum of \$1,000, issued by a constituent corporation of the present defendant company, whose liabilities, it is alleged, were assumed by defendant company in the consolidation.

The special ground of the action—which is a general creditor's bill to enforce the double liability of stockholders named—is thus stated:

"Said defendant * * * company is insolvent and has been insolvent for several months past, and in Cause No. — of the Circuit Court of the United States * * * admitted its insolvency, and thereupon in said action a receiver was appointed for such reason."

Ancillary to the purpose of the suit stated are allegations and a prayer for discovery of the names of all stockholders from 1895.

The general rule, in Ohio, as elsewhere, is that a suit of this nature to subject stockholders to their double liability can only be brought upon a claim against the corporation reduced to judgment and execution returned *nulla bona*. This rule is so well established as to render it unnecessary to cite authorities.

It is not an arbitrary rule, but is the logical deduction from the legal facts of the situation. The corporation is the principal debtor and the stockholder is only secondarily liable as a guarantor to the extent of his statutory liability. The corporate property is the primary fund for payment of the corporate debts and the statutory liability of the stockholder is a security to be resorted to only where payment of debts can not be enforced against its property. In a word, it is to all intents an equitable asset and the suit to subject is in the nature of a proceeding in aid of execution—a supplementary proceeding.

While this is the rule, courts of equity recognize exceptions and in certain cases uphold the right to sue without requiring a reduction of the claim to judgment, where the corporation itself is actually in process of liquidation—as upon dissolution or bankruptcy proceedings. This obviously just execution is in accordance with the principle that a court of equity will not insist upon requirements that are vain, where it is clearly necessary for the protection of a meritorious claim to prevent unnecessary and perhaps fatal delays.

These principles are recognized in this state as the basis of the law enforced in its courts. *Hays v. New Balt. Turn-Pike Co.*, 1 Handy, 281; *Piatt v. St. Clair*, 6 O. S., 277; *Bamberger v. Turner*, 13 O. S. 263; *Bawrick v. Gifford*, 47

O. S., 184; *Bronson v. Schneider*, 49 O. S., 438; *Younglove v. Lime Co.*, 49 O. S., 663; *Kulp v. Fleming*, 65 O. S., 338.

The petition in this case fails to state a case for the enforcement of this secondary liability of stockholders. The plaintiff's claim is not due, and, moreover, the allegations raise a strong presumption that his bond represents a debt fully secured upon the corporate property; and it is therefore fairly inferable that he became a creditor of the corporation, not in reliance upon the property of the corporation and the guaranty of the stockholder, but upon the immediate and direct security by way of mortgage which thus set apart the corporate property to his specific security. But even if the bond is not secured by mortgage, equity secures it by raising an equitable lien superior to all subsequent claims, except as against a subsequent innocent purchaser for value paid, without notice; and this lien is good even as against a subsequent mortgage. *Compton v. Railway Co.*, 45 St., 592.

The obvious purpose of the law of double liability is to give general creditors who deal with the corporation upon the faith only of a general creditor's claim upon the corporate property in the ordinary course of business, an additional security which tends to promote good faith on the part of corporate officers by making it to the interest of stockholders to see to it that good faith is observed. On principle, therefore, a creditor who deals at arm's length and secures himself at the expense of general creditors by mortgage upon the corporate property should not be entitled to the guaranty afforded by the double liability of stockholders, unless, in analogy to this principle of the bankruptcy law, he places himself in the situation of a general creditor by surrendering his special security, or at least until and to the extent that he is able to show that his security is inadequate.

The only allegation in the petition here is that the consolidated company—not the mortgagor—is insolvent. But this is not sufficient to make the case an exception to the general rule first stated. The insolvency and the receiver-

ship referred to in the cases upholding the exceptions to the rule, are conditions such as dissolution proceedings, bankruptcy, etc., which necessitate a winding up and general liquidation of the company's affairs. In Ohio this is made clear in many cases and it is necessary to refer only to the two cases reported in 49 O. St. (*supra*).

In *Bronson v. Schneider* (p. 438 *et seq.*), the general rule and the exception are clearly discussed, and the right of action to enforce double liability is held to arise only where—

“The property is by some legal proceeding put in process of application to the payment of its (the corporation's) debts so as to render a judgment against it impossible or nugatory, as where the corporation is dissolved or thrown into bankruptcy, or placed in the hands of a receiver, or has assigned for benefit of creditors.”

In this statement the illustrations must be held to conform to the thing illustrated, and consequently the receivership indicated must be one involved in some winding up proceeding where the property is “put in process of application to payment of debts.”

But this is placed in a clearer light in the case of *Younglove v. Lime Co.* (p. 663), where, on page 666, the court is at some pains to illustrate the distinction by reference to a receivership in that case as one *not* made because of insolvency necessitating a winding up of its affairs, and by way of antithesis, says:

“Any inference that his appointment was for the cause or purpose named is inconsistent with the fact that for nearly three years he carried on the business of the company under the direction of the court, and then, by its order, restored the property to the company.”

On page 667 the court further says:

“The creditor's right of action against the stockholders does not accrue when the corporation becomes insolvent merely in the sense that its property is insufficient for the payment of its liabilities.”

The above citations do not exhaust the list of Ohio cases bearing upon the subject and declaring the same principles.

There is, however, a further principle involved, arising out of the fact that the defendant here is not the debtor, but the successor in title of the debtor under the railroad consolidation act. The petition shows that the consolidation was effected after the bond in question was issued and claims the right to sue by reason of the alleged insolvency, not of the original debtor, but of the consolidated successor. The statute indeed casts upon the consolidated company the liabilities of its constituents; but provides that all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired. (R. S., Sec. 3384).

What is sought to be enforced in this case is a secondary liability, not of the original company, but of individual stockholders of the consolidated company. It would seem that the individual liability of the contingent company should not be shifted to the stockholders of the new company by the mere act of consolidation and could not be legally assumed unless by written agreement of each new stockholder, under the statute of frauds; for which reason also, as it seems to me, the petition is defective.

And this suggests another objection, namely, an allegation of the insolvency of the new company *per se*, would not necessarily imply the insolvency of the original company. The original company is "deemed to be in existence" to preserve the rights of creditors (R. S., Sec. 3384). *Non constat* but the old company may be entirely solvent, even while the consolidated company may be hopelessly insolvent by reason of the debts of the other companies. *Compton v. Railway Co.*, 45 O. S., 592 (618-20).

For these reasons and others not necessary to elaborate, the petition in this case seems to me defective and the demurrer must be sustained.

Demurrer sustained.

Burch & Johnson, for plaintiff.

Edward Colston, for defendant.

GEORGE W. HARRIS v. THE CINCINNATI, HAMILTON &
DAYTON RAILWAY CO. ET AL.

1. A demurrer having been sustained, and it appearing upon tender of an amended petition that the initial defect is not susceptible of amendment, leave to file will be refused and the cause dismissed. (Code § 5116, § 5320.)
2. A mortgage creditor whose debt is not yet due and whose security is not shown to be inadequate or exhausted, can not maintain a creditor's bill, especially when the grounds alleged for the proceeding are that the affairs of the defendant are in the hands of a receiver in process of settlement.
3. The basic theory of a creditor's bill is that legal assets are non-existent or beyond reach, and is negatived by the fact that the assets of the defendant are in the hands of a court in process of general settlement, which includes plaintiff among beneficiaries.

HOSEA, J.

On motion for leave to amend, etc.

Demurrer having been sustained to the petition, the present application for leave to file an amended petition is governed by Section 5116 of the code, which conditions the right to amend upon the susceptibility of the defect to amendment; and this I understand to be the question presented upon the amendment proposed. Before considering certain details necessary to be noticed, it may be well to review established principles that lie at the foundation of this entire proceeding.

This suit is to subject stockholders to statutory liability; and it has been repeatedly held that such suit is in the nature of a "creditor's bill," and governed by like rules. *Umstead v. Buskirk*, 17 O. S., 14; *Males v. Murray*, 7 N. P., 614.

And this court long ago pointed out that a creditor's bill in equity could only be brought upon a judgment, and execution unsatisfied; and that our statutory action allowing such bill to be filed after judgment, without or before execu-

tion, upon the ground of no property to levy upon, was in the nature of an equitable attachment or execution and not pursuit of a trust fund. *Hays v. Bridge Co.*, 1 Handy, 281 (283).

This distinction is most important; moreover, since equity acts in analogy to the law, and since attachment statutes are strictly construed, so in equity the grounds of proceeding must be clearly and fully pleaded and proved. These suits are in the nature of proceedings *in rem*, rather than *in personam*, and in their nature ancillary and not original. *Houghton v. Axleson*, 64 Kansas, 274.

Such a suit is to be resorted to only when the creditor is unable to satisfy his established claims at law, either on account of insufficiency of legal assets or other circumstances rendering legal remedies inadequate. *Overturf v. Gerlach*, 62 O. S., 127; *Bank v. Beebe*, 62 O. S., 41; *Vanderbank v. Mattingly*, 62 O. S., 25.

It is an established rule that no mere money claim or simple contract debt can be made the basis of a creditor's proceeding in equity until reduced to judgment at law. *Tompkins Co. v. Carawba Mills*, 82 Fed., 780; *Clark v. Strong*, 16 O., 318.

This results from the fact that only equitable demands can be recognized and passed to a money decree in equity; but as equity can properly act in the enforcement of a lien, the lien of a judgment is regarded as within the scope of its powers.

But, nevertheless, the suit is entertained only where the ordinary processes of law are unable to reach a satisfaction of the judgment, and is to be resorted to only in cases of necessity and this must be made apparent, to give the court jurisdiction. *Hubbel v. Perin*, 3 O., 287.

While these general rules are fundamental, yet, where the debtor has absconded and left no legal assets, or where some other special condition exists rendering execution, or, in some cases, even a judgment nugatory, equity, to prevent a total failure of justice, may intervene.

For illustrations of the exceptional conditions, see 4 *Pomeroy's Equity*, 1415 (and notes).

In the light of the authorities it is incumbent on a plaintiff, in order to justify a court of equity in entertaining a suit like that at bar, to plead cogent facts, making it apparent that—to use the familiar formula of chancery—he is “without relief save by the interposition of the court” of equity. To establish the grounds of jurisdiction he must set forth a claim showing him to be a “decree creditor”; *i. e.*, either in judgment or capable of being established by a finding; or one enforceable through a lien which is inadequate or exhausted. *Johnson v. Miller*, 50 Ill. App., 60; *Preston v. Colby*, 117 Ill., 477; *Barrett v. Reid*, Wright, 700; and also showing that only by a resort to the statutory liability can the debt be satisfied.

In a word, the proceeding being, not original but purely ancillary, and based on the impossibility of reaching legal assets as the fruition of a legal proceeding, all the facts showing its necessity must be pleaded to give the court jurisdiction. It is an established requirement of such a suit that the bill must show definitely where, in what manner, and by what contracts the indebtedness claimed arose, so as to inform the defendant. *Elwell v. Johnson*, 3 Hun (N. Y.), 558; *Gray v. Kendall*, 10 Abb. Pr. R., 66; *Guano Co. v. Heatherly*, 38 W. Va., 499.

Reading the proposed amended petition, with these requirements in mind, it seems to me to fall far and fatally short.

(1) The petition, as now amended, is designed to set forth a simple contract claim not yet due in terms; and though alleged to have become constructively due, no finding is prayed nor is it proposed to give the defendant any opportunity to contest it.

(2) But the change in the mode of stating the claim now made—omitting material averments and changing others to more indefinite form—render the presumption arising upon the original petition the more certain under a familiar legal and ethical rule. A material fact stated in a petition can not be suppressed as an admission of record by amendment. Consequently, it is to be assumed that the claim is

secured by mortgage, and this is not shown to be inadequate or exhausted.

(3) It is also shown that the suit and receivership, alleged as a ground of the present proceeding, are for the purpose of applying all the property of the defendant to the payment of the obligation held by plaintiff among other debts. But this admits that the defendant has legal assets and that the plaintiff's claim is now in process of settlement under a proceeding which is to all intents both legal and an equitable execution. So far, then, as concerns the basic theory of a creditor's bill, namely: that legal assets are non-existent or beyond reach, it is exploded by the admission that assets are actually in possession of a court of competent jurisdiction, by its receiver, who, with respect to any property under plaintiff's lien, stands toward plaintiff in a fiduciary capacity. The possession of this property of defendant is, therefore, not hostile or adverse to plaintiff's, but for his benefit and for administration in due course.

But the mortgage securing the bond in this case is to be presumed ample to secure the debt; and no court has power, in dealing with the property, to ignore or destroy the plaintiff's record rights therein.

Thus in every aspect of the case the proceeding seems to me unnecessary and certainly premature. The facts alleged do not bring the case within the recognized limits of suits of this character.

Leave to file the amendment will be denied; and, as the defects of the alleged cause of action are manifestly vital and irremediable, the defendant may take an entry dismissing the petition.

Leave refused and petition dismissed.

Burch & Johnson, for plaintiff.

Edward Colston, for defendant.

HARRISON v. KIRKBRIDE.

1. The relation of attorney and client is one of limited agency in respect of the suit or matter in hand. Without specific authority the attorney can not bind the client by contract relating to specific property.
2. Where property under mortgage or execution in a pending suit is voluntarily taken by the judgment creditor, or so used as to change the title or deprive the debtor of his property without pursuing the prescribed methods, the debt is gone although the creditor does not realize full payment.
3. So if the officer in charge of the property, instead of pursuing the prescribed mode of sale, wastes the property or experiments with methods not recognized by law, the debt is discharged and the plaintiff's remedy is against the officer. But if plaintiff is a party to the irregular proceedings, his remedy is gone and the judgment is satisfied.

HOSEA, J.

Suit is to enjoin the sheriff of Hamilton County from levying an execution for a balance of \$238 upon a judgment rendered by the Common Pleas Court of Hancock County, Ohio. It appears that upon suit filed in that court Oct. 27, 1899, by *Joseph A. Kirkbride v. J. T. Harrison, W. L. Perkins* and the *Karg Oil & Gas Co.*, to foreclose a mechanic's lien upon a certain oil-lease of lands in said county, and an "oil-well rig" erected thereon, said court, at its April term, 1900, found the sum of \$314 due from defendants and decreed, in default of payment within three days, a sale of the property by the sheriff of said county in satisfaction of the debt, as upon execution.

The defendant, Kirkbride, by answer claims that by agreement of Harrison, Perkins and the Karg Oil & Gas Company with himself, the oil-well rig was sold by said parties for \$135, which was paid into the Hancock Common Pleas Court to be credited upon his said judgment; that said sale was private and agreed to by this plaintiff, who waived his rights therein; and he admits that said sale did not

include the leasehold; and he denies that the judgment is satisfied, and prays dissolution of the temporary injunction heretofore entered in this case.

The testimony taken by Kirkbride tends to prove a verbal argument between his counsel and the counsel of Mr. Harrison, Mr. Perkins and the Oil Company, subsequent to the decree, authorizing him (Kirkbride's counsel, Mr. Doty), to sell the rig for \$135, which he did. No other testimony on this point was offered by Kirkbride; but Mr. McConica, counsel for Harrison and the Oil Company, testifies denying such authorization and declaring that the talk was tentative merely as a proposal to obtain the consent of the clients to such course.

There is also testimony showing that the value of the rig was very much less when sold to be removed—as was the case here—although the purchaser (a brother of Kirkbride) resold shortly afterward at \$166 for use near by; and that the rig was worth \$300 to \$350 in place in connection with the lease. Kirkbride also offered proof to show that the lease was of no value, which proof was not convincing.

It is manifest upon this state of fact—(1) That the defense of authority to sell the oil-well rig is not maintained. Proof of a contract of this nature made with attorneys as such, with nothing more, does not tend to prove—much less prove—the agreement alleged in the answer.

It is well established that the relation of attorney and client is one of limited agency, with respect to the suit or matter in hand; and ordinarily there is no implied power to do more than relates to the proper conduct of the suit. He can not, without specific authority, bind his client by contract, nor enter into agreements respecting his client's property. *Hagerman v. Bates*, 5 Colo. App., 391; *Brooks v. Kearns*, 86 Ill., 547; *Stuck v. Reese*, 15 Iowa, 122; *Ry. Co. v. Egbert*, 151 Penna. St., 53; *Garret v. Hanshue*, 53 O. S., 482.

In *Beard v. Westerman*, 32 O. S., 29 (32), the point decided is substantially identical. I quote from the opinion:

“One Lovell, an attorney of Westerman (plaintiff below),

was offered to prove that by agreement between himself as such attorney, and Beard, the latter was to take possession of and sell the (mortgaged) property. This testimony was ruled out and properly so. There is nothing to show that Lovell, as attorney of Westerman, was authorized to make such an agreement. He was employed to bring suit and collect the notes, but that does not authorize him to make the contract proposed to be proved." (Citing *Wilson v. Jennings*, 3 O. S., 528; *Card v. Waldbridge*, 18 O., 411).

(2) With this point disposed of, the case stands upon the voluntary taking and conversion of the mortgaged property by the judgment creditor, pending a decree in foreclosure; and it is clear, as matter of law, that the execution under consideration here has no legal validity.

It does not appear whether the original petition in the foreclosure suit asked also for a personal judgment or not; but this is not material because the court entered merely the ordinary decree in foreclosure finding an amount due, and decreeing sale of the property in satisfaction of the debt. This is not a personal judgment and execution can not issue upon it except for a balance remaining after the exhaustion of the mortgaged property by public sale under the decree, and upon a new suit based on such finding. *Conn v. Rhodes*, 26 O. S., 244; *Doyle v. West*, 60 O. S., 438 (443-4).

As the testimony shows that there has been no attempt to enforce the decree, it is obvious that there can be no valid execution against other property of the judgment debtor.

(3) But this is not all. In this case, the property was brought in *custodia legis* by the formal lien and the suit upon it. This point I had occasion to decide in the Pike's Opera House case, which was subsequently affirmed by the General Term (see reports in *Court Index*, June 19, 1903, and 49 O. L. Bulletin, No. 23, p. 401).

The decree finding the lien valid and ordering a sale by the sheriff had in equity an analogous effect to the levy of an execution in an action at law, and brings into opera-

tion a rule thus stated *In re Dawson*, 20 Abb. New. Cas., 188:

"The judgment is satisfied when the execution has been so used as to change the title or in some other way deprive the debtor of his property. * * * When the property is lost to the debtor, in consequence of the legal measures which the creditor has pursued, the debt is gone although the creditor may not have been paid. * * * The rule does not depend on satisfaction of the debt. It is that the debtor's property has been actually lost to him in consequence of the legal remedies which the creditor has pursued."

A further statement of the rule will be found in *Harris v. Evans*, 81 Ill., 420, as follows:

"The levy of an execution upon personal property subject to execution, of value sufficient to satisfy the debt, is of itself a satisfaction of the execution. No other levy could lawfully be made by virtue of that execution until the property levied upon had been sold in the regular course prescribed, and had failed to pay the debt. * * * *If the officer, instead of pursuing the regular mode of sale prescribed, wastes the property or experiments with modes of sale not recognized by the law, the debt is discharged and the remedy is against the officer. If the plaintiff is a party to the irregular proceedings, his remedy is gone and the judgment is satisfied.*"

The principle set forth in these cases would govern the case in hand, even if a personal judgment had been rendered and execution issued. *A fortiori* it applies where a formal lien is acquired by the creditor, which is brought into court and a decree is rendered establishing its validity and ordering sale, pending which the judgment creditor takes manual possession and destroys the identity of the property, thereby rendering the further action of the court impossible. All presumptions arising upon these facts must be availed of for the protection of the judgment debtor; and among them is the presumption that the property was of sufficient value to satisfy the debt in the condition in which it stood under the lien and in the foreclosure proceedings. It is clear that by the irregular proceedings of the judg-

ment creditor, the debtor's property has been lost to him. It would be strange law that would authorize a judgment creditor, after obtaining a decree in foreclosure, to take and convert the thing pledged, allow such sum as he might choose as a credit upon the debt sued upon, and then, after usurping the functions of the court thus far, obtain its aid in enforcing collection of such balance as he might then claim to be due. The statement of such a proposition carries its own refutation.

The injunction heretofore granted must be made perpetual and it is so ordered.

Judgment for plaintiff with costs; perpetual injunction ordered.

B. C. Fox and J. T. Harrison, for plaintiff.

W. G. Kirkbride, for defendants.

REUBEL *v.* M. & E. CANAL.

1. Where, in a contract for sale and delivery of goods, payment is made a condition precedent to transfer of title by delivery of possession and there is no waiver of payment, no title vests until price is paid.
2. Mere delay not indicative of an election not to rescind the contract and not to the injury of the other party, does not forfeit right of vendor to rescind.
3. Waiver of a stipulation in one's favor is not a performance by the other party. It may be an excuse for non-performance, and, as such, must be pleaded in order to justify proof of that fact.

HOSEA, J.

Opinion on demurrer to petition.

This is a demurrer to a petition filed by the American Car & Foundry Company asking an order directing the receivers to return to the petitioner certain property purchased by the defendant upon a cash contract and alleged to have been de-

livered by mistake without payment; or to authorize suit in replevin against the receivers.

This property was delivered on board cars at Huntington, West Virginia, on May 14th, 1903, but no date of actual delivery to defendant is shown. The petition was filed July 22d, 1903, and it is claimed that the delay thus shown—from May 14th to July 22d—is conclusive evidence of a waiver of the contract stipulation for payment before delivery.

Under the contract set forth, payment was a condition precedent to the transfer of title by delivery of possession (23 Ohio St., 311, *Wabash Elevator Co. v. Bank*) and where there is no waiver of payment no title vests until the price is paid.

Mere delay, as between the parties, which is not indicative of an election not to rescind the contract, and is not to the injury of the other party, does not forfeit the right of vendor to rescind. 33 Ohio State, 63, *Hodgson v. Barrett*.

A waiver, by one party to an agreement, of a stipulation in his favor is not a performance of that stipulation by the other. It may be an excuse for non-performance, and, as such, should be pleaded. 37 Ohio State, 49, *Methurin v. Stone*.

It is obvious, upon these authorities as well as the general principles of law, that if there is any merit at all in the contention, it must be taken by answer, and not by demurrer. It is a question of fact for the jury.

Demurrer overruled.

SMITH v. JOHNSON.

1. Testimony of police records offered in an action for injuries suffered through negligence of defendant, to show that plaintiff led an "irregular" life and thereby to countervail medical testimony as to a condition of nervousness resulting from the accident, is inadmissible as involving a *non sequitur*. The major premise of the syllogism is faulty in assuming a relationship of cause and effect that may be true of a class or in the average, to be true of every individual in the class.
2. Testimony of police records as to arrests on criminal charges, offered to impeach the general character of a plaintiff in an action for negligence, is inadmissible to impeach credibility.
3. It is not error for the court to refuse to charge the jury on the subject of contributory negligence, where there is no proof of contributory negligence in the case. If such charge is given and the question is left to the jury, it is not an error prejudicial to the defendant, but in his favor.

HOSEA, J.

Heard on motion for a new trial.

The facts, in brief, as developed in the trial, were that defendant's wagon stood backed against the pavement curb at right angles therewith. The loading, as appears, was completed, and certain planks projected from and beyond the wagon bed wholly or partially across the pavement. Some barrels stood at the house line behind the wagon, which impeded the space for passage, if any existed, at the rear of the projecting boards. Plaintiff, coming along the pavement toward her home near by, seeing or supposing that there was no passage-way at the rear, started to go into the street to pass around the obstruction as others had done. At about that time the driver mounted the wagon, and started the horses quickly sidewise in such manner that the projecting lumber was swept with force laterally around across the pavement, so that it struck the plaintiff, knocked her down and injured her severely.

Plaintiff and her attending physician testified to her good

health prior to the accident, and to specific impairment of health resulting from the injuries received.

Objections based on what are claimed to have been erroneous rulings in the case by the trial judge are here considered in the order presented.

(1) Plaintiff and her physician having testified that she was in good health before the accident, the attending physician who had also treated her for the injuries received, was asked on cross-examination whether "regularity or irregularity of life affected a patient's health," and he answered affirmatively.

Thereupon, defendant proposed to prove *by police officers* that plaintiff had led an "irregular" life, which testimony was excluded by the court.

Defendant admits that such testimony, if offered to impeach the character of plaintiff, would be properly excluded, but claims that the offer was "for the purpose of showing that the injury complained of, especially her extreme nervousness, was not due wholly, if at all, to the accident, but was the result of her mode of life."

It was competent for defendant to contradict the plaintiff's testimony as to her good health before the accident; but this means her *physical*, not her *moral* health. Under the elementary rule requiring the best kind of evidence suited to the fact to be shown, the proof must be direct and not indirect; that is, the evidence must relate to physical and not moral symptoms. What was proposed to be shown was a purely collateral fact of a wholly different class of facts assumed to possess such a relation of cause and effect with the fact to be shown, as that the primary fact might be conclusively presumed from the collateral fact. But the major premise of the syllogism is faulty in assuming that a relationship that might possibly be true of a class or in the average, is true of every individual in the class. History and common observation disprove the assumption. The method of reasoning upon which defendant sought to introduce the testimony has also been discredited by the Supreme Court. (See *Village of Shelby v. Claggett*, 46 O. S., 549 (555).)

It may be worth while to note, also, that the "irregularity" of life which the physician (Dr. Erwin) understood counsel to ask about, and concerning which he answered, had reference solely to regularity of bodily habit—as to eating, sleeping, etc.—and not, as counsel erroneously assume, to dissolute, dissipated, or immoral habits, as clearly appears in the next succeeding question and answer to those here quoted from the brief. The omission to include this in the brief was doubtless an oversight, but, nevertheless, important; for the omitted testimony takes away the entire basis of fact for the argument.

It is often assumed that people with red hair have ungovernable tempers; but the assumed relation would hardly make proof that a man had red hair admissible for the purpose of contradicting evidence of a peaceable and quiet disposition.

(2) On cross-examination the plaintiff was asked the question, "How many times have you been arrested?" which was ruled out upon objection; and the dictum in *Coble v. The State*, 31 O. S., 102, is cited as authority to the contrary.

That case, however, was a criminal prosecution under Section 139 of the Criminal Code, providing that convictions may be shown to affect credibility, and is not in point in civil cases of this nature. The established rule as to attacking credibility in civil cases is by proving reputation for veracity; and proof must be restricted thereto, and not involve the entire moral character. *Perkins v. Mobley*, 4 O. S., 688.

Moreover, it is within the discretion of the trial court to allow or disallow cross-examination as to a witness' past record, and it should be excluded if unjust to witness or is not called for by the case. *Wrae v. State*, 20 O. S., 460 (471); *Hanaff v. State*, 37 O. S., 178 (180); *Bank v. Slemmons*, 34 St., 142 (147). Nor can questions be asked in cross-examination, as to collateral matters, for the purpose of contradiction. *Kent v. State*, 42 O. S., 426. And in a case of the nature of that at bar refusal to admit evi-

dence of moral lapses has been sustained by our court of last resort. *Shelby v. Claggett*, 46 O. S., 549.

The action of the court here is sustainable upon another ground, namely, that it is not permissible under guise of a cross-examination at any time to get in evidence not provable in defense. *Duval v. Dariey*, 32 O. S., 604 (613).

(3) Refusal of third special charge that: "if plaintiff by her own testimony in support of her cause of action, raises a presumption of contributory negligence, the burden rests upon her to remove that presumption."

A review of the testimony in the case satisfies me beyond question that this charge was properly refused. There is nothing whatever in the plaintiff's testimony—or any other testimony in the case—that implies or raises even a suspicion of negligence on her part.

The theory urged by defendant throughout the case, and especially in argument, however, caused the court to lose sight of the first and better impression on this point, and to leave this question to be determined by the jury. It is admitted that this was a technical error; but, if so, it was in defendant's favor and not to his prejudice.

The theory of defendant is based on the assumption that plaintiff on approaching the wagon, and seeing the boards projecting over the sidewalk, was bound to anticipate the possibility (1) of the driver getting on his wagon; (2) of his starting his team with suddenness; and (3) of starting—not directly forward, or to the left, but—to the right, at such an angle with the pavement as that the wagon would swing upon the hind wheels as a pivot, and carry the projecting boards across the pavement like the projecting scythe of an ancient war chariot; and that, anticipating these possibilities, she was bound to govern herself accordingly and keep out of the way.

It is safe to say that "ordinary care" requires no such prescience. Although the question was submitted to the jury—a fact of which the defendant can not complain—yet it is clear from the record that, as a matter of law, the court should have taken the responsibility of deciding the point and so advising the jury. The jury decided it properly.

(4) The charge as to facts excusing contributory negligence, though unnecessary, is not to the prejudice of the defendant, if no contributory negligence existed. That it was the duty of the driver to look before starting his team must be conceded. The pavement is for pedestrians exclusively. He had no right to so load his wagon as to make it a dangerous agency to those passing rightfully on the pavement, and then, without taking any precaution against injuring others, start it in such manner as to swing the boards around in a manner that could not possibly be anticipated by any one on the pavement. The omission to look or to give warning, coupled with his sudden and rapid starting sidewise—thus giving the boards an added danger in the impetus of their swing—made his negligence so gross as to indicate entire indifference to the rights or safety of others.

The error in the charge was not prejudicial, and the motion for a new trial will be overruled.

John C. Rogers, for plaintiff.

W. M. Tugman and *R. B. Smith*, for defendant.

SCHMUDDI v. MEYER.

1. In executed contracts the question of consideration is immaterial. The question of consideration has relation to the enforcement of an executory promise.
2. Want of consideration can not be pleaded against a surety upon a joint bond who has paid his share, and payment has been accepted and party formally released.

HOSEA, J.

Motion for judgment on the pleadings as to Meyer.

Meyer is shown by the petition to be one of the sureties on the bond of Havekotte, guardian of plaintiff and his

sister. The final account of the guardian, filed and confirmed in August and September, 1897, showed a balance of \$1,077.65 due this plaintiff, on which he admits a payment of \$712.70, and seeks to recover against the co-sureties Meyer and Mehmert, the balance of \$364.95 with interest from August 1, 1897. The bond attached is in the usual form.

In his answer, Meyer pleads a payment of \$1,500 to plaintiff and his sister jointly, and a joint release and acquittance in writing, releasing him individually from all further liability upon said bond, said acquittance being in due form, dated December 30, 1897, and signed by plaintiff and his sister.

By his reply, plaintiff admits the signing of the acquittance pleaded, and says he received thereon \$712.70. Then follow a number of immaterial averments relating to representations made to him by Meyer and Attorney Dewald, who paid the money—\$712.70—and required plaintiff and his sister to sign the release as a condition of payment, etc.

He then says there was no consideration for the "surrender of the residue of \$1,077.65 due him," etc., nor for the release of Meyer as surety.

The brief of plaintiff intimates a number of matters additional to those pleaded, all of which, if susceptible of proof, might—so far as they go—form the basis of a proceeding in equity to set aside the acquittance and release as obtained by fraud, etc.

The matters pleaded in the reply, however, are too fragmentary and immaterial to be considered in a suit at law upon the bond, as an answer to a formally executed release, and must be discarded.

The denial of consideration is, moreover, a conclusion of law in view of the facts admitted.

If, as claimed by the plaintiff, the bond is joint and several, the right of settlement by composition with one of several sureties without discharging the rest, existed at common law. If the bond is joint, the statutes give a right of settlement with and discharge of a surety without affecting the liability of the others.

The question of consideration does not often arise in *executed* contracts, for the reason that where parties on both sides have carried their intentions into effect, it is presumed that the consideration was satisfactory. In fact, the original settlement of the question of consideration applies the rule which theretofore was confined to verbal promises only to all simple executory contracts (as distinguished from those under seal or *specialties*) of an executory nature. (*Rann v. Hughes*, 7 T. R., 350).

This has now become elementary doctrine, and—as usually stated in the text-book—“a simple executory promise not supported by a valuable consideration is void as between the parties thereto”; that is, it is unenforceable. *The consideration, in other words, goes to the right of enforcement.* After the parties have voluntarily performed, it is no longer a contract, properly speaking, but a thing done and must so exist until undone.

A promise to waive a lien, for example, can not be enforced except upon a valuable consideration; but after the lien is waived (as by the cancellation of a mortgage or a minor lien), all the king's horses of the law could not put Humpty Dumpty on the wall again—excepting that a court of equity acting upon grounds of fraud or mistake can decree the restoration by compelling the individual to undo the wrong.

The rule is, therefore, that in executed contracts the question of consideration is immaterial. Page on Contracts, § 2281.

Under these circumstances, I do not see how this action can proceed against Meyer so long as the release and acquittance pleaded, whose execution is admitted by plaintiff, stands unrescinded and legally unimpeached.

The plaintiff, when he signed it, was of full age and he must be presumed to have fully known the finding of the court upon his account, because he must have had full notice of its filing and confirmation as required by law. There is no showing that he was, in any way, misled by Meyer; and the alleged representations of Dewald were in respect of matters he is presumed to have known all about. More-

over, the document he signed is clear and explicit in its terms and simply released one surety, and did not affect his right to recover the balance due him.

The defense of Meyer is complete upon the pleadings, and there is nothing for the jury to pass upon in his case; and he will be dismissed from the action.

Motion granted.

J. G. Penn, for plaintiff.

D. S. Oliver, for defendant.

THE UNION SAVINGS BANK & TRUST CO. v. THE PIKE
BUILDING CO. ET AL.

1. A covenant to insure in a lease, is in the nature of a covenant running with the land and can not be dealt with as a separate equity.
2. A purchaser at judicial sale, while not a party to the *suit*, is a party to the *sale*, and is bound to take notice of the character, condition and amount of the property sold, and to details which are matters of public record, under the maxim, *Id certum est quod reddi certum potest*.

HOSEA, J.; SMITH and FERRIS, JJ., concur.

Motion to set aside sale.

The view that we take of this case renders an extended opinion unnecessary upon the present motion. A sale in foreclosure carries with it all the interest in law or equity of the mortgagee, and, by consequence, that of the mortgagor; and whatever inheres in the estate sold passes to the purchaser. 16 O., 125, *Frische v. Kramer's Lessee*; 10 O. S., 339, *Childs v. Childs et al.*

It is obvious that if the lease involved in this suit had been duly assigned prior to the destruction of the buildings, the assignee would have stepped into the shoes of the lessee

completely with respect to every covenant of the lease. The covenant as to insurance had reference to the lessee in his capacity as such, and not to the individual independently of that relation. The destruction of the buildings simply brought into existence the conditions provided for by the covenant, but in nowise altered the nature of the covenant or the lessee's relation thereto. It was an inherent condition of the leasehold estate, in the nature of a covenant running with the land; and was not and could not become and be dealt with as a separate equity. It was of the essence of the estate mortgaged and sold, just as is the privilege of purchase; and, being such, passed under the mortgage. What was to be sold upon foreclosure was not—as counsel insist—a tangible sum of money realized, but the interest and estate of the lessee, of which estate these things are incidents and involve a right to insist upon the performance of the covenants on the part of the lessor based upon due performance by him who succeeds to the rights of the lessee.

The intent, only, is necessary to make this such a condition as runs with the leasehold estate; and we are of opinion that this clearly appears in the instrument of lease in question. *Masury v. Southworth*, 9 Ohio St., 341; cited and approved in *Easter v. Railroad Co.*, 14 O. S., 48-51; *Smith v. Harrison*, 42 O. S., 180-184; *Railway v. Bosworth*, 46 O. S., 81-86.

The objections urged to the advertisement, etc., are such as would come with greater propriety from the purchaser; but, nevertheless, we are unable to perceive how the interests of the mortgagor are prejudiced. While a purchaser is not a party to the suit, he is, in the language of the Supreme Court, "a party to the sale" (15 O. S., 350), and bound to take notice of the character, condition and amount of the property sold. All details were matters of record in the suit and the lease was duly recorded in the public records. *Dresbach v. Steint*, 41 O. S., 70, 71 (77).

The object of the advertisement is not to apprise purchasers of all details connected with the title, but merely to attract them by a general description of the property or

interest to be sold. *Id certum est quod reddi certum potest*, applies to purchasers as an obvious corollary to the rule of *caveat emptor*, which applies in all strictness to judicial sales.

The recent decision of this court at special term, cited, as reference—so far as this point is concerned—to an advertisement that was misleading in character, because it described by metes and bounds only, ignoring the existence of a brick dwelling-house on the property, and leading the public to understand that the property to be sold was mere vacant land without improvements. The advertisement was, therefore, incomplete under the statute; moreover, this was but one, and not the most important, of the grounds for setting aside the sale in that case, but none had any bearing upon the case at bar.

We perceive in the proceedings of the sale here in question, no irregularity, much less any prejudicial error. The privilege of purchase and the covenant as to insurance were properly considered as elements in appraising the value of the lessee's estate, and that estate or interest valued *en gros* was the thing sold.

Motion to set aside sale is denied. Motion to confirm sale granted, and sale confirmed.

John C. Healy, W. Austin Goodman, Thos. H. Kelley, Drausin Wulsin and J. H. Bromwell, for plaintiff in error.

Powel Crosley and J. C. Rogers, for defendants in error.

COOK v. TRACTION COMPANY.

1. A motion for new trial will be overruled where the facts are all within the province of the jury to determine.
2. Each party has a right in governing his own conduct to assume that the other will perform his duty also and act accordingly, unless and until he sees or by the exercise of ordinary care might see, that it is dangerous to do so. But a party can not be permitted to neglect his own means of self-preservation in reliance upon such assumption.
3. The plaintiff has the burden of showing, in connection with defendant's negligence, that he (plaintiff) could not, by the exercise of ordinary care, have avoided the consequences of such negligence.

HOSEA, J.

Motion for new trial.

After a painstaking review of all the testimony, and a careful consideration of the legal questions involved, I am led to the conclusion, notwithstanding the very able presentation by the attorneys for plaintiff, that the matters in issue were all strictly within the functions of the jury to determine and that the court would not be justified in setting aside the verdict.

The plaintiff, driving toward town, was in the out-bound track of the street car line, where he knew cars frequently passed, and that one was expected at about that time.

The out-bound car was traveling at a speed variously estimated from eight to twelve miles per hour, and the motorman saw plaintiff's horse and wagon about one thousand feet away, coming toward him; but, owing to an intervening curve in the track, could not tell whether plaintiff was in the tracks or at the side, until he reached the curve. He saw plaintiff's wagon in the track, as he admits, at fifty to seventy-five feet distance, realized his peril, and immediately applied the reverse; but it was impossible to stop in time to avoid the collision.

Plaintiff testifies that he did not see the car until right

upon him, although the evidence shows that the headlight was burning. Plaintiff's wagon was closed in front with glass, on which frost had accumulated, but he kept a peep-hole open, by which he could see forward.

The time was about daylight, but snow covered the ground and objects could be seen at a considerable distance.

The duties of both parties as to safety are reasonably clear.

"Each party has a right, in governing his own conduct, to assume that all others will perform their duties also, and act accordingly; unless, and until, he sees, or, by the exercise of ordinary care, might see, that it is dangerous to do so. But it will not permit a party, in reliance on such an assumption, to neglect his own means of self preservation." *Sh. & Redf. on Negligence*, § 92 and notes.

The motorman was undoubtedly justified, in this instance, in supposing that his car, being in full view of the approaching wagon, was seen by the driver; and that the latter, if in the track, would turn out in due time. There seems to be no beginning-point for a charge of negligence against the defendant until the curve was reached and the actual position of plaintiff realized. The car being on a downgrade, with brakes set (though to some extent defective), it was necessary for the motorman to throw off the brakes and apply the reverse—which took an appreciable interval of time.

So that it is not unreasonable to believe that the car could not have been stopped in time to avoid the collision, even if the sanding apparatus had been in good order. On the other hand, the plaintiff is chargeable with direct notice of his dangerous position in the outgoing track from the time he entered upon it. He, therefore, by the exercise of his faculties could have seen the car one thousand feet away, and could have turned out at any time, even when the car was only seventy-five feet away.

So that, even if mutual negligence be assumed, and the exception to the rule be invoked in plaintiff's favor, he is still barred of recovery under the rule established in Ohio, as follows:

"The law in cases of mutual negligence is, that, although there may have been negligence on the part of plaintiff, yet, *unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence*, he is entitled to recover." *R. R. v. Crawford*, 24 O. S., 631, (638), citing *Timmons v. R. R.*, 6 O. S., 105."

This rule clearly puts upon the plaintiff the burden of showing, in connection with the negligence of defendant, that plaintiff could not, by the exercise of ordinary care, have avoided the consequences of it.

In the present case there seem to be but two theories that may explain the failure of plaintiff to see the defendant's car; one, that he was asleep, and the other, that he had carelessly allowed the peep-hole in his glass window to become obscured by frost. Of these the first is the more probable, because, in the latter case, he should have been attracted by the flash of the headlight, even through the frosted window, at quite a distance away.

But either condition would be fatal, because it would have prevented plaintiff from taking ordinary care—that it, exercising his faculties of observation—to avoid the injury.

Entertaining these views, I am compelled to deny the motion for new trial.

Motion overruled.

Clare, Dickerson & Clayton, for plaintiff.

Kittredge & Wilby, for defendant.

HAROLD EVERHEART V. THE U. S. INVESTMENT & REDEMPTION COMPANY.

1. The unpaid subscriptions to stock are parts of the trust fund, including all other property of a corporation, upon which creditors have a lien prior to that of shareholders.
2. Various methods are adopted in other jurisdictions to reach these assets, but in Ohio the creditor's suit is favored, and not only may unpaid subscriptions be reached, but also the statutory double-liability enforced, in such a suit.
3. Query: Whether the same method may be pursued in reaching unpaid subscriptions against resident stockholders of a foreign corporation to pay local debts, where the action does not adjudicate the affairs of a corporation nor attempt to wind up its business? Certainly an individual creditor may proceed against an individual stockholder.

HOSEA, J.

Motion to strike from files, amended petition, etc.

The question involved in this motion has reference to the proper method to be pursued to reach, on behalf of creditors, the unpaid subscriptions of stockholders upon their stock.

The amended petition seeks to make the delinquent stockholders parties, and is substantially a creditor's bill to subject the assets of the company in Ohio, as a trust fund, to the payment of debts.

The motion is based upon the theory that the amended petition is an interference with procedure proper to be taken by the receiver; that the stockholders are not necessary nor proper parties; and that the suit would be thus converted into one for the dissolution and formal winding up of the company—which can only be done in the parent state of the company—West Virginia.

It is fundamental law that the capital stock and other property of a corporation is a trust fund for its debts, and creditors have a lien or right of priority in relation thereto over shareholders.

The unpaid subscriptions to stock are parts of this trust

fund held by shareholders, *cum onere*, subject to all the equities that attach to it. If the directors do not assess and collect in the subscriptions, equity will interfere and make the assessment by ordering the shareholders to pay the amount severally assessable against them, to whomever may be made the custodian of the fund. 13 Wisc., 57, *Adler v. Brick Co.*, 30 Fed. Cas. 179944.

In some jurisdictions the method indicated by the motion here, is pursued, namely, for the receiver to procure an order on the stockholders to show cause and, on the return day, for the court, upon hearing, to grant or refuse an order of assessment (55 N. J. Eq., 396) and for the receiver or assignee to bring independent suits against those liable under the call (53 Minn., 423).

But these methods are not favored in this state, where the money agreed to be paid in is regarded as part of the trust fund and is reached directly by a creditor's bill against equitable assets. 11 Ohio, 273, *Meiers v. Turnpike Co.*; 13 Ohio, 197, *Meiers v. Turnpike Co.*; 17 Ohio, 187, *Henry v. Railroad*.

In 20 Ohio State, 190, *Warner v. Callender*, the court holds not only that the unpaid subscription may thus be reached in a creditor's suit, but that the statutory liability may also be combined; and this principle is affirmed in 53 Ohio State, 534, *Peter v. Foundry & Machine Co.*

In 57 Ohio State, 486, it is pointed out that an action by a receiver against a stockholder to recover unpaid subscriptions to stock is a legal action and consequently subject to the rigid rules governing actions at law; and contrasts the more comprehensive and direct method of procedure by creditor's bill in a suggestion on this point to the law-making power, citing *Smith on Receiverships*, 174.

In 61 Ohio State, it is held that the ten per cent. required to be paid in upon incorporation, but in fact not paid, is an equitable asset that can be reached by a creditor's bill, in addition to stockholder's liability.

These authorities are conclusive as to the method of procedure against Ohio corporations, and there would seem to be no inherent reason why a suit of this nature against

stockholders of a foreign corporation residing in Ohio, is not a proper one, where, as in the present case, the purpose of the suit is to subject assets within the jurisdiction to the payment of debts and does not involve the integrity of corporate franchise or a winding up of the corporation as such.

In 65 Ohio State, 321, *Kulp v. Fleming*, the question of the power of an Ohio court to deal with a foreign corporation is somewhat discussed and the language of the opinion might, at first reading, seem to be adverse to the proposition involved in the case at bar, but, upon due consideration, I am led to the opposite conclusion. The suit was by a single creditor against a single stockholder of a Kansas corporation to enforce his double liability, and the suit was sustained. The court says:

"It being thus determined that the liability is contractual, and that it is several, and that the creditor first bringing action obtains a prior lien with which other creditors may not interfere, we see no reason why it can not be enforced against a stockholder individually, in Ohio, by action against him alone. True, our method of enforcing the liability of stockholders is by a proceeding in the nature of a suit in equity which contemplates the bringing in of the corporation, of all the creditors, and of all the stockholders, and a decree which will adjust and finally settle the rights and liabilities of the parties. * * * But our courts have no jurisdiction to adjudicate the affairs of a foreign corporation, and any attempt to wind up its business by a comprehensive decree in our courts would be futile.

"Whether, when it is shown that there are other stockholders residing in Ohio, the plaintiff might properly make them parties and maintain a suit against all that might be served, we need not inquire, for no such fact appears in the present case."

It is to be noted that the question related solely to the double liability imposed by statute, and the holding of the court is: that where by the laws and policy of the parent state such obligation is regarded as a contractual one (as also in this state) it may be enforced. But, as said by the

learned counsel who contested the proposition in the case cited:

"In considering the question of liability of stockholders for the indebtedness of a corporation, it should be borne in mind that the liability of stockholders for unpaid stock is an entirely different thing from double liability or the superadded liabilities to an amount equal to the amount of stock owned.

"The liability of a stockholder to creditors for the amount remaining unpaid on his stock existed at common law and might be subjected by any creditor to the payment of his claim."

The "proceeding in the nature of a suit in equity," employed in Ohio, is based upon the principle of avoiding a multiplicity of suits, and is made practicable because the corporation is (usually) a creature of our law and the stockholders are principally residents of Ohio. 65 Ohio State, 339.

In the present case, all these conditions exist, except that the corporation is technically the creature of another state; yet, as a matter of fact, it is an organization of our own citizens who obtained a foreign charter presumably to avoid double liability, but doing business solely in Ohio.

Granting that our courts would have no jurisdiction to entertain proceedings to wind up a foreign corporation, and make a complete settlement of its affairs, yet I do not perceive any controlling reason why the essential principles declared and established in the Ohio cases above cited can not be properly extended to a suit by Ohio creditors to subject the assets of the corporation in Ohio to the payment of debts. It is simply a logical extension of the "Ohio idea" as to methods of procedure, to several creditors where the Supreme Court has sustained it as to one.

If there could be any objection to this course, it can properly come only from the defendants; but they are not objecting. The motion is by a creditor, who, if the rigid rule he invokes were enforced, would have no right to intervene. The referee's report on file, and the supplemental answer and cross-petition of the defendant company, gives

all the facts necessary, and the amended petition of plaintiff brings in the laws of West Virginia as a guide of action. To set all this aside and give power to the receiver, who is a mere custodian of the fund, to begin a multiplicity of suits, *de novo*, would create additional expense to no purpose. The motion will be denied.

Motion denied.

Harrison & Aston, for plaintiff.

Louis J. Dolle, for defendant.

JEPHTHA D. DAVIS V. SARAH J. FOSSETT.

1. Suit against a widow for a debt of her deceased husband, based upon Revised Statute 3110, can not be maintained in any event without showing that the deceased husband's estate is insolvent, even where the debt is known to have been created for family necessities.
2. Our statute in this regard is declaratory of the common law, making it the duty of the husband to support the family, with a modern proviso casting the duty on the wife only in case of his entire inability.

HOSEA, J.

Motion for non-suit.

The petition alleges medical services rendered to Jesse Fossett, husband of plaintiff, in his last illness at his instance and request; that defendant and Jesse Fossett lived together as a family; that defendant is possessed of a separate estate, but that Jesse Fossett had no means, was unable to work or earn anything or contribute to the support of the family; and that at death his estate was not sufficient to pay any part of plaintiff's claim of \$400; for which judgment is asked against his widow—this defendant.

The answer admits the services rendered, the family relationship of defendant and Jesse Fossett, and their living together, and denies all other allegations of the petition.

The plaintiff, upon whom rests the burden of proof to maintain the action, proved the services and their value, the non-payment, the presentation of the bill to his estate after his decease, and the fact of an application by his administrator to the probate court to sell real estate to pay debts. The evidence on this point is a petition filed in the probate court setting forth a schedule of the debts—including plaintiff's claim—and the costs of administration; that there was no personal estate; that the deceased was at death seized in fee simple of certain specified real estate, a sale of which is asked. There is also produced an entry in said court and cause confirming sale and distributing proceeds as to the *first* one only of the several pieces of real estate described in the administrator's petition—this being all the testimony adduced.

Th plaintiff having rested, the defendant moved for judgment of dismissal upon the ground that the facts in testimony do not sustain a cause of action against the defendant.

The action is based upon the Ohio statute which is as follows:

"Section 3110. [*Duty of husband to support family.*]

The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, his wife must assist him so far as she is able."

The petition, it will be observed, alleged that the husband, Jesse Fossett, "had no means"—"was unable to work or earn anything or contribute to the support of the family"—and that at death his estate was not sufficient to pay any part of plaintiff's claim. The proof in support of the petition entirely fails to show (1) that Jesse Fossett had no means; or (2) that he was unable to work and contribute to the support of his family, excepting that he was unable to work during the illness resulting in his death; or (3) that his estate was unable to pay the debt.

On the contrary, the record of the probate proceedings produced, show that he possessed various pieces of real estate, and that only a part of the real estate set forth was sold and that the claim of plaintiff is recognized and al-

lowed by the administrator as a valid claim against the estate.

Granting for the sake of the argument, that a creditor of the husband for necessities required and used in the support of the family or himself, may proceed against the wife's estate in case of the inability of the husband to pay, the inability must be shown as a fact, as the condition precedent of such proceeding. The liability of the wife, in respect of her separate property in such a case, is in the nature of an equitable asset and the proceeding is in the nature of one in aid of execution. Until the husband's estate has been first exhausted, and this fact proved, no ground is established for proceeding against the wife for a debt which is primarily that of the husband.

That this is the proper construction of the statute in question seems to me too obvious for discussion, and if doubts could arise upon the clause quoted, as it stands alone, they are dispelled by the context before and after, defining the general and special relations of husband and wife. (Revised Statutes, Sections 3108 to 3117 inclusive.) See, also, *Kelly v. Miller*, 2 D., 265.

The Iowa, Illinois, and other cases cited, are based upon statutes providing in terms that debts created for family support, education of children, etc., are, in the first instance, *joint and several debts of the husband and wife*. Consequently such authorities have no application here. Our statute is declaratory of the common law obligation, with a modern proviso making the wife liable in a certain contingency only. Before she can be charged, the contingency specified by the statute must be clearly shown.

The testimony adduced here fails to show the conditions necessary for the maintenance of the action upon the liability of the wife.

Motion granted and the action dismissed at plaintiff's costs.

A. J. Cunningham and J. T. Harrison, for defendant.
Bates & Meyer, for plaintiff.

APOLLO BUILDING ASSOCIATION V. SOPHIA SCOTT AND
GEORGE E. SCOTT.

1. Sales of property in judicial proceedings should follow immediately after the appraisalment (Revised Statutes, Section 5389-5390)—unreasonable lapse of time, ground of setting aside sale, coupled with low appraisalment.
2. Advertisements of judicial sales must apprise the public of the *nature* and situation of the property; and, if in the city, its relation to contiguous streets (Revised Statutes, Section 5391-1). An advertisement describing the land only, is not sufficient if it omits description of tenements thereon.
3. To authorize a judicial sale of lands on terms of credit, the lands must have been twice offered and remain unsold (Revised Statutes, Section 5417).
4. A purchaser at judicial sale is not a proper party in proceedings to confirm, except by permission of court, and his unauthorized motion should be stricken from the docket at his cost.

(1) Motion, filed June 20, 1903, by Geo. E. Scott to set aside appraisalment and sale.

(2) Motion, filed January 27, 1904, by purchasers to confirm sale.

(3) Motion, filed January 30, 1904, by plaintiff to strike motion of purchasers from files.

HOSEA, J.

In this suit a decree of foreclosure was rendered at the February term of this court, 1901, authorizing an order of sale to issue directing the sheriff to appraise, advertise and sell the mortgaged premises as upon execution, at one-fourth cash and balance in one, two and three years, secured by mortgage, or all cash, at option of purchaser.

An order of sale was issued November 19, 1901, the property appraised at \$3,000, and order returned by direction of plaintiff's attorney, January 22, 1902.

A second order of sale was issued April 10, 1903, the property advertised by description of lands only, and sold for \$3,650 on May 16, 1903.

The first motion in order of time was reasonably filed by George E. Scott, a defendant, on June 20, 1903, and will be first considered.

The grounds of this motion are: (1) Too low an appraisalment; (2) purchase price below real value; (3) other reasons argued at the hearing; and is supported upon the question of value by affidavits of five persons who swear that they are familiar with property and values in that locality, one of whom places the reasonable value at \$4,500, three of them at \$5,000, and one at \$6,000—an average of \$5,100.

Three counter affidavits—one by the sheriff's deputy who made the sale, in the nature of an argument for low appraisements generally; one by an appraiser who appraised the property upon the inquisition; and one by the husband of the purchaser as to being refused access to the house upon the property—are filed in opposition to the motion, by the purchasers, who are not parties to the suit. A stranger to the record can not of right take part in proceedings; and while in a proper case one who, although not a party, is interested in the subject-matter (Code, Section 5121), may be permitted to intervene, such permission is within the discretion of the court to grant or refuse. *Callender v. Ry.*, 11 O. S., 516 (520). The case of *McBain v. McBain*, 15 O. S., 337 (350), cited in argument is not in point. The incidental remark of Judge Welch that "a purchaser, though not a party to a suit is a party to a sale," has reference to constructive notice of irregularities in the proceedings as affecting his title.

In the case at bar, the purchasers have not obtained leave to intervene, and as the affidavits are in the nature of a *lucus a non lucendo*, they encumber the record to no purpose and will be stricken from the files.

Were the question here solely one of value, I would be loth to set aside an appraisalment and sale on this ground, in the absence of fraud or manifest mistake.

But an examination of the record discloses other errors deserving of serious consideration.

The testimony as to under-valuation derives added im-

portance from the fact that the appraisement was made about a year and a half prior to the sale. A reading of the statutes relating to execution sales will clearly indicate the policy of the law. By Section 5389, the officer levying an execution is required to summon appraisers, who are required to return to the officer *forthwith* their estimate of the real value in money; and by Section 5390, a copy of this is to be *forthwith* deposited with the clerk and the execution officer is required to *immediately* advertise and sell. There are obvious reasons why this policy of diligence should be recognized and enforced in a country like ours where values are not stable and may undergo material changes from time to time. The great lapse of time between the appraisement and sale coupled with the testimony showing the property to be worth nearly double the appraised value, shows a condition deserving of serious consideration by the court.

This is heightened by a fact of such common knowledge as to justify judicial cognizence, namely: that the appraisement was made during a period of universal depression of real estate values in this community, which has now largely passed away.

But there are still other reasons to be considered. The law relating to advertisements of execution sales (Section 5391-1) contemplates such a description as will apprise the public fully of the nature and situation of the property—a description not only of the land, but also the tenements thereon, if any, and of the exact situation of the property (if in the city) as related to contiguous streets.

In this case, the advertisement is confined to the technical description of the bare land. *Non constat* that if a party desiring to purchase a residence ready for occupancy had seen the advertisement, he would have supposed, from the omission of all reference to the improvements, that it was vacant property. Who can say how many other bidders might have been present if this fact—all the facts contemplated by the statute—had been given?

Nor do I know of any authority in such a case for fixing terms of credit upon the sale in advance of any effort to

sell for cash. The object of execution sales is to convert property into cash for immediate discharge of a judgment, and not to create *new* debts and *new* delays.

The only statutory authority of this nature that I am aware of, is that conferred by Section 5417, authorizing the court, where property is twice offered and remains unsold, to make terms of sale at one-third cash and remaining thirds in successive years.

Taking all these reasons together, I am satisfied that the appraisal and sale should be set aside, and it is so ordered.

This renders it unnecessary to pass upon the other motions excepting for purposes of costs.

As already shown, a stranger to the record can not intervene except by permission of the court. In this case there was no application made and no leave granted. The subsequent motion of the plaintiff was, therefore, properly made and will be granted with costs of both motions and of the affidavits in opposition against the purchaser.

Motion of George E. Scott to set aside appraisal and sale, granted.

Motion of Apollo Building Association to strike from files motion of purchasers, is granted.

Motion of Minnie E. Zimmerman and Emma A. Hamilton, also the three affidavits filed in the cause in their behalf, are stricken from the files at their costs.

J. H. Charles Smith, for plaintiff.

John W. Strehli, Shay & Cogan and *Dempsey & Friedman*, for defendants.

THE HAUSER, BRENNER & FATH CO. v. THE H. E. POGUE
DISTILLERY CO.

1. Under the statute authorizing service upon the "managing agent" of a foreign corporation in this state, a service upon the president residing in this state is good.
2. Such president who maintains an office in this state and transacts correspondence and other corporate business is estopped by such acts to deny his power to represent and bind the corporation. Such acts fix his official status and representative character in this state.

HOSEA, J.

Motion to quash service of summons.

Petition filed Nov. 13, 1901, for money only, on a debt created in May and August, 1900.

Personal service on John F. Pogue, managing agent of defendant, on fourth alias summons, Dec. 24, 1902, and then motion filed Jan. 15, 1903.

With and in support of motion to quash, is filed an affidavit of John F. Pogue, alleging that he is president of the defendant company, a Kentucky corporation, carrying on a distillery at Maysville; that said company does not maintain an office at Cincinnati; that he was served at his residence at Cincinnati; and that he is not a designated agent of the corporation in Ohio.

On March 16, 1903, Stephen Hauser, Jr., president of plaintiff, files affidavit alleging positively the following facts:

(1) That he made the contract sued upon with John F. Pogue, then first vice-president and managing agent of defendant, in 1899, at defendant's office in the United Bank Building, Cincinnati.

(2) That the defendant then maintained and does still maintain an office in said building for the transaction of business, and that affiant and others have there transacted business on behalf of defendant with and through said Pogue.

(3) That said office has become and is well known to the trade and the business world as the office of defendant through their advertisements; and submits in proof a bill of defendant against plaintiff, dated Nov. 5, 1900, signed by John F. Pogue, upon a regular engraved letter head of defendant corporation, showing its full corporate name, containing a cut of defendant's distillery and other matter, with the usual heading of "Cincinnati, O.," as the place of writing, and above it and beneath the cut, the legend: "Cincinnati Office, United Bank Building, Long Distance Telephone 734," and at the left, the names of the corporate officers, including John F. Pogue, first vice-president.

Arthur D. Hauser, officer and employe of plaintiff, with equal positiveness avers that the office of defendant was in the United Bank Building in 1898, 1899, 1900 and 1901, and was so designated on the letter heads of defendant and in the Cincinnati Directory; and that he made collections and had business dealings there in relation to defendant with said John F. Pogue as vice-president and managing agent.

The defendant, on March 27, 1903, counters with affidavits of John F. Pogue, president; Henry E. Pogue, general manager, and William L. Pogue, vice-president.

John F. Pogue, president, denies that he is the "managing agent" (quoting the words); avers that he is an attorney at law, and has an office in the United Bank Building. He admits the card in the City Directory, referring to the H. E. Pogue Distillery Co., but claims it was to avoid confusion of correspondence and mail deliveries as between himself and the H. & S. Pogue Co. (presumably the dealers in dry goods); but alleges discontinuance of said card prior to filing this suit. He admits the letter heads, but says they are for his personal convenience in "conducting his personal correspondence in connection with the business of the defendant company"; admits transaction of business with plaintiff at his office in United Bank Building, but claims that Hauser knew that "all such business was necessarily submitted to the company at Maysville," and no contracts "closed or consummated" at Cincinnati; that all

dealings between the parties, "aside from the first or primary negotiations," were conducted at Maysville; and the matters in controversy were submitted to affiant at his office in Cincinnati for convenience of plaintiff. He denies that any sign of the defendant has been or is upon his office door.

The allegations of A. D. Hauser as to collections are denied "so far as affiant remembers"; and he avers individual unfamiliarity with the construction of cooerage and plaintiff's knowledge of this fact; and admits visits of Wm. Pogue to Cincinnati before and after the contracts sued upon to consult plaintiff with reference thereto.

The remaining affidavits vary but little in substance or phraseology from that of John F. Pogue, and add nothing essentially new to the status of fact.

A careful consideration of these affidavits leads to the conclusion that the defendants fail to meet and answer the allegations of fact applicable to the prior dates involved, and also fail to recognize the distinction between the practical operation of the distillery and details of business connected therewith, and the management of the corporate affairs, *per se*.

John F. Pogue, while he may be unfamiliar with practical details of manufacturing, etc., is nevertheless the president and chief executive officer of the corporation, which as a creature of law requires legal, rather than manufacturing skill for the management of this branch of its service—and possibly this was the reason for his selection.

To say that the president of a corporation is not a "managing agent," is but a mere quibble of words. A corporation can only act through its agents. All its legal officers are its agents, and the president is chief; and is, by virtue of his office, the responsible head of the corporate business.

A so-called "general manager" is usually an employe, although the duties may be performed by an officer; but the law recognizes no such office in a corporation.

It may well be that practical questions, such as relate to

cooperage and the like, should be referred to the general manager at Maysville, and that the president or managing vice-president might be governed in his corporate action by the skill and advice of a general manager, but the making of contracts is an act of corporate power which is controlled by the principle: *Delegatus non potest delegare*.

There is no doubt in my mind that the corporation, by permitting John F. Pogue, a resident of Cincinnati—its first vice-president and later and now, its president—to transact its corporate business here (for conducting correspondence, negotiations, and making of contracts, etc., is corporate business), and especially by the direct averments of its letter heads and advertisements, held itself out to the world at the date of this suit and at date of the service of summons, as maintaining an office and an agent here; and as this agent is its official head, it is estopped by these acts to deny either the fact of his agency or his plenary power to represent and bind the corporation.

If it has failed, being a foreign corporation, to take the steps required by law to entitle it to do business in this state, that is a wrong which it can not plead as an excuse or take advantage of to the detriment of its creditors.

With respect to suits against corporations, Section 5044, R. S., provides that service may be had upon the president or other chief officer, or, if he be not found in the county, then upon its cashier, treasurer, secretary, clerk, or managing agent; and Section 5046 provides "that service on a foreign corporation having a managing agent in this state, may be had upon such managing agent."

It must be admitted, as decided by the Supreme Court of the United States in 106 U. S., 360, *St. Clair v. Cox*, that the mere accidental and temporary presence of a corporate officer or of a managing agent in the state, as, for example, in passing through the state as a traveler, or on a temporary visit not connected with the company affairs, would not make service upon him valid to bind the corporation. As Justice Field properly says:

"To involve the representation of the company * * * he

would be required to be here as agent or officer of the corporation, and not as an isolated individual."

This and other similar authorities do not apply here, for the obvious reason that John F. Pogue admits his permanent residence, his official status, and the transaction of corporate business at this place, and of giving actual notice to the business world of these facts. "This," to further quote Justice Field's words, "declares and fixes his official status and representative character in this state."

The case in 21 C. C., 230 (*Bucket Pump Co. v. Eagle Co.*), differs from the case at bar in this essential particular, namely, that there the service was upon an employee soliciting orders, having no authority to conclude contracts or bind the company.

Another section of the code indicates a like distinction in the law of procedure between an officer of a corporation and its agent—one being an agent in a special sense and occupying the status of a party, the other being a mere representative or agent in the general sense. I refer to Section 5102, relating to verification of pleadings, wherein precisely the same distinction is made between the officer of a corporation and its agent, as between a party and his agent. This distinction rests upon the same fundamental reason in both cases, namely, that the officer of the company is the direct and special agent selected and authorized by the stockholders; whereas, the ordinary agent is but an employee who can only bind the company by virtue of special statutes.

Upon the facts here, I am satisfied that the service of summons personally upon John F. Pogue, admittedly the president and chief officer of the defendant company, and who resides and transacts business for the company in Cincinnati, is a good service and binds the company.

Motion to quash denied.

G. W. Hardacre, for plaintiff.

Pogue & Pogue, for defendant.



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